88-948

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

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THE CITY OF BRUNSWICK, GEORGIA,
Petitioner,

vs.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

—o—

On Petition for Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

—o—

PETITION FOR A WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's opinion in this case improperly construes the Equal Access to Justice Act in such a way that the vast majority of municipalities are no longer eligible to recover their attorney's fees and litigation expenses from the United States under that Act.

2. Whether the Eleventh Circuit improperly disregarded the district court's findings and substituted its own judgment concerning whether the City of Brunswick had a net worth of less than $7 million, so as to be ineligible to recover its attorney's fees from the federal defendants.

3. Whether the Eleventh Circuit disregarded the plain language of the Equal Access to Justice Act in reversing the district court's finding that the government's conduct was not "substantially justified," where the statute requires that the "underlying agency action" be the focus of the court's review, and where the district court's findings were in accord with the statute.

LIST OF PARTIES

The parties to the proceedings below were the petitioner The City of Brunswick, Georgia.

The parties below also were respondents The United States of America, The Director of the Federal Emergency Management Agency, and his successors in office, and The Administrator of the Federal Insurance Administration and his successors in office.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE PROCEEDINGS	2
STATEMENT OF FACTS	3
ARGUMENT:	
I. THE COURT OF APPEALS IGNORED THE CLEARLY ERRONEOUS RULE IN REVERSING THE DISTRICT COURT'S FINDING THAT THE CITY OF BRUNSWICK HAD A NET WORTH OF LESS THAN $7 MILLION, AND IN SO DOING, THE COURT ESTABLISHED A PRECEDENT THAT EXCLUDES, AS A MATTER OF LAW, VIRTUALLY ALL MUNICIPAL GOVERNMENTS THAT OTHERWISE WOULD HAVE BEEN ELIGIBLE FOR RECOVERY OF ATTORNEY'S FEES IN LITIGATION WITH THE FEDERAL GOVERNMENT.	8
II. THE ELEVENTH CIRCUIT DISREGARDED THE STATUTORY COMMAND THAT THE "UNDERLYING AGENCY ACTION" BE THE FOCUS OF A COURT'S REVIEW IN DETERMINING WHETHER THE GOVERNMENT'S CONDUCT HAS BEEN SUBSTANTIALLY JUSTIFIED.	12

TABLE OF AUTHORITIES

Page

CASES

American Pacific Concrete Pipe Co. v. NLRB, 788 F.2d 586 (9th Cir. 1986) 10

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 8

City of Brunswick v. United States, 661 F.Supp. 1431 (S.D. Ga. 1987) 3

Continental Web Press, Inc. v. NLRB, 767 F.2d 321 (7th Cir. 1985) 10

Russell v. National Mediation Board, 775 F.2d 1284 (5th Cir. 1985) 14

United States v. Estridge, 797 F.2d 1454 (8th Cir. 1986) 15

STATUTES

28 U.S.C. § 1254 2

28 U.S.C. § 2412 ..... 2, 7, 8, 13

40 C.F.R. § 35.935-1(b) 11

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit in this case is reported at 849 F.2d 501 (11th Cir. 1988), and is reprinted in the appendix hereto.

The opinion of the United States District Court for the Southern District of Georgia is reported at 661 F.Supp.

1431 (S.D. Ga. 1987), and is reprinted in the appendix hereto.

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JURISDICTION

Petitioners seek review of the decision of the Eleventh Circuit Court of Appeals rendered on July 11, 1988. Petitioners moved the Court of Appeals for rehearing and suggestion of rehearing in banc, and those petitions were denied on September 7, 1988.

The jurisdiction of this court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(The text of the following provision is set forth in the appendix.)

1. 28 U.S.C. § 2412.

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STATEMENT OF THE PROCEEDINGS

This case arises out of a challenge by the City of Brunswick to a Flood Insurance Rate Map (FIRM) that the Federal Emergency Management Agency (FEMA) sought to impose on the City under the authority of the National Flood Insurance Act on January 28, 1986. The

settlement agreement provided that special masters be appointed by the court to review the City's technical challenges to the FIRM, and defendants agreed to modify the FIRM in accord with the errors identified by the panel. *City of Brunswick v. United States,* 661 F.Supp. 1431, 1434-35 (S.D. Ga. 1987). The court-appointed panel received evidence from the parties both in written submissions and at several hearings, and the panel's conclusions were filed with the district court on June 16, 1985. The panel agreed with the City of Brunswick that there were fundamental mistakes in the Flood Insurance Study (FIS) that was the basis of the FIRM, and the FIRM was amended accordingly. (R. 4-130 & 135.1) Upon motion, the district court awarded plaintiff attorney's fees, costs and expenses in the amount of $324,492.15 on May 20, 1986. On July 11, 1988, the Eleventh Circuit reversed the district court's judgment and held that the City of Brunswick was entitled to recover nothing. 849 F.2d 501 (11th Cir. 1988). Brunswick's petition for hearing and hearing en banc were denied on September 7, 1988.

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STATEMENT OF FACTS

In order to participate in the national flood insurance program, a city such as Brunswick must comply with the FIRM adopted by FEMA for that community. The FIRM regulates all construction and development within the city by promulgating Base Flood Elevations (BFE's) and prohibiting construction at any level beneath the BFE's. A city's FIRM is based on a Flood Insurance

Study (FIS), and in a coastal city like Brunswick, the FIS determines the likelihood of flooding by considering the possibility of a hurricane impacting the area. Since the FIRM is based on the results of the FIS, errors in the latter necessarily make the former inaccurate. In this case, FEMA employed a private engineering firm in Virginia—Camp, Dresser & McKee (CDM)—to perform the FIS for Brunswick.

Brunswick challenged the defendants' action on several grounds. First, the City challenged the FIS because of basic errors made in the methodology, the use of data, and routine calculations. This phase of the challenge was based on the Administrative Procedure Act, the National Flood Insurance Act, as amended, and the contention that FEMA had illegally delegated the entire study to CDM without overseeing CDM's work, thus leading to the study's deficiencies. The City also claimed that the methodology used required rule-making approval, pursuant to the rule-making provisions of the Administrative Procedure Act and the self-imposed rule-making regulations of FEMA. By way of relief, plaintiff sought a new FIRM based on a new FIS "using accurate data and scientifically correct methodology." (Complaint, ¶ G)

Through the settlement agreement, Brunswick obtained all of the relief that it sought. Defendants agreed to change the FIRM and FIS in accordance with the findings of the panel of three special masters who acted as arbitrators. Based on the evidence received, the panel issued a report that agreed with all of the substantial criticisms advanced by the City of Brunswick. These criticisms included the fact that the basic storm data used in the

FEMA study was wrong. Rather than use data that related to the Brunswick area, the FIS had used storm data taken from hundreds of miles away which bore no relationship whatsoever to the City of Brunswick. The procedure used was described, during the arbitration proceedings, as "a ridiculous way to get [data] for Brunswick, Georgia." (R. 5-144-Ex. 1, p. 7) The panel agreed with Brunswick and found that historical storm data had been misused. (R. 4-130-6, ¶ 1.1)

FEMA also miscalculated the storm frequencies used in the FIS.

> [T]he City's consultant, Myers, has correctly pointed out errors in the way [storm] frequencies were used in the FIS. (R. 4-130-8, ¶ 1.5)

The panel members also found:

> With regard to exiting storms, . . . the FIS erroneously uses the same distribution for all three categories [exiting, alongshore and entering] of storms. (R. 4-130-7, ¶ 1.2)

> The large R ["R" refers to the storm's radius] used in the FIS in conjunction with small central pressures is given too much weight. Low pressure, high radius conditions (particularly for R=35 nm) are very unlikely. Also, the two levels of discretization for R used in the FIS are insufficient. (R. 4-130-7 to 8, ¶ 1.3)

> The FIS storm sample apparently had 20% hurricanes. The Panel count arrived at a higher percentage of hurricanes. This changes the pressure distribution. (R. 4-130-8, ¶ 1.6)

With regard to the other major criticisms of the study made by Brunswick—relating to incorrect calibration of the model, incorrect operation of the model, and incorrect

topographical data—the FEMA study was equally deficient. The panel found:

> In the City of Brunswick FIS the 1980 applied version of TTSURGE [the computerized flooding model used here] was designed to handle inland flooding through the application of a moving-boundary concept. *However, it was discovered that this moving boundary concept was not successfully implemented.* Accordingly, the model [as used by CDM] did not allow flooding and hence did not account for the storage in the upland grids.
>
> The 1980 version of TTSURGE applied has also been identified by Arbitrator Tomasello as having problems computing barrier island overtopping and bottom stress under certain conditions.
>
> The TTSURGE model calibration for the FIS was accomplished using the astronomical tides. Depth fields and Manning coefficients were modified in an attempt to match tide ranges. The attempt to match the low tide elevations of the tide cycle led to excessive modifications to the input depth. *The resulting depth field had no resemblance to the actual depths in the area.*
>
> The effect of the greater depths tended to increase the ability of the onshore storm surges to transport water inland through the inlets and longitudinally along the intracoastal waterways and bays. These effects are demonstrated by *comparing the actual cross sections with the greatly different cross sections modeled in the FIS* at various inlets and bay tansects. (R. 4-130-24) (emphasis added)

Finally, it is noted that the city's consultant Myers had found errors in the FIS related to joint probability calculations (PROBS). These errors involve incorrect surge peaks for parallel storm tracks (notably track 24), incorrect track frequencies (addressed earlier in issue 1), and incorrect summation of probabilities. (R. 4-130-25)

Having obtained all of the ultimate relief sought, Brunswick sought an award of its attorney's fees, costs, and expenses, as a prevailing party, under the Equal Access to Justice Act (EAJA). To recover fees and expenses under EAJA, Brunswick's net worth could not exceed $7 million. 28 U.S.C. § 2412(d)(2)(B). Fees and expenses would not be awarded if FEMA proved that its action was "substantially justified." *Id.* at § 2412(d)(1)(A). The parties submitted evidence concerning the net worth of the City, and the district court found that "Brunswick's net worth meets the requirements of the EAJA." 661 F. Supp. at 1440. The district court also concluded that "the position of the United States . . . was not substantially justified" based on the court's review of the seriousness of the flaws in the FIS. *Id.* at 1442.

On appeal, the Eleventh Circuit disagreed with the district court's finding and concluded that Brunswick had a "net worth" in excess of $7 million. The panel also held that the defendants were "substantially justified" so that no fees or expenses could be awarded.

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ARGUMENT

I. THE COURT OF APPEALS IGNORED THE CLEARLY ERRONEOUS RULE IN REVERSING THE DISTRICT COURT'S FINDING THAT THE CITY OF BRUNSWICK HAD A NET WORTH OF LESS THAN $7 MILLION, AND IN SO DOING, THE COURT ESTABLISHED A PRECEDENT THAT EXCLUDES AS A MATTER OF LAW, VIRTUALLY ALL MUNICIPAL GOVERNMENTS THAT OTHERWISE WOULD HAVE BEEN ELIGIBLE FOR RECOVERY OF ATTORNEY'S FEES IN LITIGATION WITH THE FEDERAL GOVERNMENT.

While the district court found that the City's "net worth" did not exceed $7 million, the Eleventh Circuit came to the opposite conclusion. In so doing, the panel exceeded the authority of the court of appeals, which must accept those findings of fact that are not clearly erroneous. *Anderson v. City of Bessemer,* 470 U.S. 564 (1985).

The Equal Access to Justice Act, 28 U.S.C. § 2412, was amended in 1985 for the specific purpose of ensuring that small municipalities would be able to recover their attorney's fees and expenses of litigation in proper cases where they prevailed in litigation with the federal government. *Id.* § 2412(d)(2)(B)(ii). Under the 1985 amendment, "units of local government" that did not have a "net worth" in excess of $7 million at the time of the commencement of the action could recover their attorney's fees and expenses of litigation. In this case, the district court found, as a matter of fact, that the City of Brunswick, Georgia had a net worth under $7 million. Notwithstanding this finding by the district court, the Eleventh Circuit engaged in de novo fact finding on appeal and concluded

that the City of Brunswick's net worth was greater than $7 million. In so doing, the Court of Appeals not only violated the clearly erroneous rule, it also rendered a ruling that, as a practical matter, renders the overwhelming majority of local governments ineligible to recover costs and fees under EAJA. The holding of the Court of Appeals disregards the purpose of EAJA.

The panel's justification for its "finding" rested entirely on the affidavit of an accountant (Mr. Edward Haller) submitted by FEMA. 849 F.2d at 503 & n. 5. The panel opinion ignored the substantial contrary evidence that was the basis of Judge Alaimo's findings of fact. Mr. Haller's affidavit relied solely on his belief that the term "total municipal equity" which was contained in a financial report of Brunswick, equated with the City's net worth. *Id.* That very report, however, was prepared by another accountant, Mr. James Barger. Mr. Barger vehemently denied that this entry, which he made, had anything to do with the City's net worth. Mr. Barger gave a thorough and reasonable explanation of what he meant by the term, and he also testified that the net worth of the City was well under $7 million. (R. 7-168-Ex. 45)

Secondly, the panel opinion did not mention the expert testimony of Mr. Rhett Harrell, a local government accounting specialist with the Atlanta office of Touche Ross & Company who offered expert testimony on behalf of Brunswick. He confirmed the opinion of Mr. Barger that the net worth of the City was well under $7 million. (R. 7-168-Ex. 47) In addition, he specifically addressed the assumption by the defendants' accountant, Mr. Haller, that the phrase "total municipal equity" could be equated with "net worth." Mr. Harrell explained:

> Equating "total municipal equity" with net worth gives improper significance to the term "total municipal equity." That term is considered to be nothing more than a memorandum entry without independent significance according to generally accepted accounting principles. (R. 7-168-Ex. 47, ¶ 5)

Although other circuits have held that such "generally accepted accounting principles" are to be used in determining net worth, *Continental Web Press, Inc. v. NLRB,* 767 F.2d 321, 323 (7th Cir. 1985); *American Pacific Concrete Pipe Co. v. NLRB,* 788 F.2d 586, 590-91 (9th Cir. 1986), the panel opinion completely disregarded this evidence and the finding of the district court that was based upon it.

Relying on this and other ample evidence in the record, Judge Alaimo found that certain restricted and legally dedicated property of Brunswick did not add to the City's net worth under appropriate accounting principles since the property could not be used for any other purposes, it could not be sold, and it was absolutely unavailable by law for the payment of *any* debts, including the expenses of litigation. The panel concluded otherwise by adopting the view advanced by Mr. Haller that Brunswick's net worth was increased by this restricted property because "legal title" was technically in the City. 849 F.2d at 503. *It is undisputed that nothing in accounting literature supports this view.* (R. 7-168-Ex. 47, ¶ 6) Moreover, Mr. Haller's view in this regard was patently inconsistent because *he acknowledged that other property should be excluded from net worth calculations even though the City had "legal title" to it.* (R. 7-168-Ex. 45) This inconsistency alone was a fair basis upon which the district court could discount Mr. Haller's testimony.

The panel opinion went on to hold that, if Brunswick's net worth included the restricted asset at issue here—the City's water and sewer system—then its net worth would exceed $7 million. *This appellate finding is completely inconsistent with the evidence in the record.*

The Brunswick water and sewer plant at issue here carries with it liabilities that the panel did not address. Specifically, since nearly all the cost of the plant was provided by EPA grants, Brunswick is legally obligated to operate the system as such for the life of the plant, 40 C.F.R. § 35.935-1(b), and if the City failed to do so, the EPA could seek "recovery of funds from the grantee [the City of Brunswick]." 40 C.F.R. § 35.935-1(b). Mr. Haller made no attempt to address or evaluate these very real and substantial liabilities. Yet it is undisputed that all liabilities must be deducted to arrive at net worth. See 849 F.2d 503, n. 2 and cases cited therein.

The *only* evidence in the record concerning the extent of these liabilities and their effect on net worth comes from the testimony of Mr. Haller. That evidence is as follows:

> [I]f it were proper to include the restricted water and sewer system in determining the City's net worth . . . , one would also have to include as a countervailing liability the obligation of the City to repay the EPA, in the event that the City ceased using the water and sewer system as such. Doing so would sufficiently reduce the purported net asset value of the system so that, when added to the fund balance and generally unrestricted property, *the amount would be less than $7 million.* (R. 7-168-Ex. 47, ¶ 7) (emphasis added)

This evidence is undisputed. For that reason, Judge Alaimo's ultimate finding on the net worth question was fully

supported by the evidence, whether or not the restricted water and sewer plant is included.

II. THE ELEVENTH CIRCUIT DISREGARDED THE STATUTORY COMMAND THAT THE "UNDERLYING AGENCY ACTION" BE THE FOCUS OF A COURT'S REVIEW IN DETERMINING WHETHER THE GOVERNMENT'S CONDUCT HAS BEEN SUBSTANTIALLY JUSTIFIED.

The present litigation was brought about by virtue of the several gross flaws in FEMA's Flood Insurance Study for the City of Brunswick. These deficiencies were the basis of the district court's holding that FEMA's original agency action was not substantially justified. As the court held:

> It is not disputed that Brunswick contested the Base Flood Elevations contained in the original FIS and FIRM; nor is there any question that FEMA's methodology contained errors requiring a new BFE to be adopted. . . .
>
> A careful reading of the arbitrators' report and other relevant documents in the record leaves little doubt that the FIS contained a variety of unreasonable errors. . . . Citizens and units of local government subject to federal regulations have a legitimate expectation that those federal actions will meet the professional standards of the field in which they regulate. FEMA's failure to meet those standards resulted in this litigation. 661 F.Supp. at 1442.

The Eleventh Circuit held that the district court abused its discretion in considering the competency of the FEMA study in determining "substantial justification." This decision was contrary to the statute at issue, the findings

of the district court, and the practical realities of the instant litigation.

EAJA was amended in 1985 specifically in order to broaden the scope of a court's review of what constituted the "position of the United States" in determining whether that position was substantially justified. EAJA now provides that *the government's position "means . . . the action or failure to act by the agency upon which the civil action is based,"* in addition to its litigation position. 12 U.S.C. § 2412(d)(2)(D). Based on this clear statutory directive, the district court—and the parties—focused their analysis on the original Flood Insurance Study. *That study is unquestionably "the agency action upon which this civil action is based."* As such, the district court was required to focus its attention on the FIS in determining "substantial justification."

Rather than consider the real substance of the agency's action, the panel opinion focuses instead on minor procedural points which were never an issue in the litigation. Specifically, the panel holds that FEMA was substantially justified "in refusing to grant an extension of the FIRM's effective date and in refusing to modify the FIS." 849 F.2d at 506. And the court states that "the true agency action giving rise to Brunswick's suit was FEMA's refusal to grant an extension of the FIRM's implementation to re-examine the FIS." *Id.* This holding disregards the district court's view of what the litigation was about, but that view should normally be deferred to, particularly since the lower court occupies a far better position to make that determination. Here, one could not realistically conclude that the district court abused its discretion *since the*

basic focus of the case was on the accuracy of the underlying FIS and FIRM.

In any case of agency action, one can always find some procedural steps that the government may have taken that were substantially justified. If identifying one or two such procedural decisions were sufficient to defeat an award of expenses and fees, even though the basic agency decision itself is not substantially justified, a party could never succeed under EAJA. The panel here has elevated minor procedural questions over substance and has failed to accord proper deference to the district court.

The opinion in the Eleventh Circuit is squarely contrary to the views of the Fifth Circuit Court of Appeals announced in *Russell v. National Mediation Board,* 775 F.2d 1284, 1291 (5th Cir. 1985). Since the agency action was not substantially justified, the court should not have disallowed all fees based on subsequent conduct. *Id.*

As a direct result of the Court of Appeals decision here, parties in future EAJA litigation have compelling reason to appeal any adverse decision by the district court. In essence, the Court of Appeals in this case decided that it would give a completely "new look" to the substantial justification issue. Disagreeing with the district court's view, the Court of Appeals focused on other aspects of the record, and decided that the government's action was substantially justified. No deference was given to the district court's conclusion. That being the case, adverse attorney's fees decision under EAJA will necessarily be appealed with much greater frequency than they have been in the past when it was believed that the district court's determination was entitled to substantial defer-

ence. See *United States v. Estridge,* 797 F.2d 1454 (8th Cir. 1986).

Substantial discretion in EAJA cases should be vested in the district courts. Public policy requires that litigation over fees and expenses be limited, to the extent possible, to the initial decisions of the trial courts. Not only is it contrary to the public interest to provide incentives for appealing fee determinations, district judges are necessarily much more familiar with all of the facts of the case, the conduct of the parties, the legal theories advanced, and hence the issue of "substantial justification," and their decisions on this issue should be entitled to a heavy presumption of irregularity.

Respectfully submitted,

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The CITY OF BRUNSWICK, GEORGIA,
Plaintiff-Appellee, Cross-Appellant,

v.

UNITED STATES of America, et al.,
Defendants-Appellants,
Cross-Appellees.

No. 87-8543.

United States Court of Appeals,
Eleventh Circuit.

July 11, 1988.

Before JOHNSON and HATCHETT, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case arose out of the City of Brunswick's challenge to the determination by the Federal Emergency Management Agency (FEMA) of the flood level figures used in calculating Brunswick's eligibility for federally subsidized flood insurance. The United States District Court for the Southern District of Georgia awarded Brunswick $324,492.16 in attorney fees, costs, and other expenses pursuant to the Equal Access to Justice Act, 28 U.S.C.A. § 2412. *See City of Brunswick v. United States,* 661 F.Supp. 1431 (S.D.Ga.1987). On appeal, the government challenges, *inter alia,* the district court's determinations that Brunswick met EAJA's "net worth" requirement and that the "position of the United States" was not "sub-

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

santially justified." We agree with the government and thus reverse the district court.[1]

1. *Brunswick's Net Worth*

As relevant to this issue, recovery under EAJA requires that the prevailing party be a "unit of local government, . . . the net worth of which did not exceed $7,000,000 at the time the civil action was filed." 28 U.S.C.A. § 2412(d)(2)(B)(ii). The district court rejected the government's argument that Brunswick's net worth exceeded $7 million when the civil action was filed in July 1985. We reverse the district court.

This issue, apparently a question of first impression, turns on the definition of "net worth." The government relies on the "Annual Financial Report of the City of Brunswick for the Fiscal Year Ended June 30, 1985." The report, prepared by certified public accountants retained by Brunswick, shows a "Total Municipal Equity" of $22,010,596. The government's expert witness explained in an affidavit that "Total Municipal Equity" as used in the report equates to Brunswick's net worth. Consequently, the government argues that by exceeding EAJA's net worth limit Brunswick cannot recover under EAJA.

Brunswick responds that its net worth is less than $7 million because the term "net worth" should not include

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1. Because of our holding, we do not reach the government's challenges to (1) a fee award based, in part, on an hourly rate exceeding the statutorily presumed rate of $75 per hour, (2) the number of hours billed, and (3) the amount awarded for certain expenses. Similarly, our holding makes it unnecessary for us to address the district court's determination that Brunswick was not entitled to fees for the fees litigation (Brunswick's cross-appeal).

"restricted" assets (those assets not generally available to meet the payment of debts). Specifically, Brunswick argues that the government erred by counting Brunswick's water and sewage system as an asset. The inclusion or exclusion of this system determines whether Brunswick's net worth exceed EAJA's limit.

Congressional intent regarding the definition of "net worth" is sparse. The House and Senate Reports associated with EAJA's enactment in 1980 each contain identical language: "'Net worth' is calculated by subtracting total liabilities from total assets. In determining the value of assets, the cost of acquisition rather than fair market value should be used." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4994; S.Rep. No. 253, 96th Cong., 1st Sess. 17 (1979).[2]

When EAJA was first enacted in 1980, however, Congress did not expressly provide for recovery by a unit of local government. Only when it adopted amendments to EAJA in 1985 did Congress do so. A statutory interpretation problem, as recognized by the district court, resulted because the term "net worth" generally is not used in reference to the financial status of a municipality.

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2. In the context of determining whether depreciation can be subtracted from a company's net worth, the Seventh and Ninth Circuits have held that Congress intended for "generally accepted accounting principles" to apply and consequently depreciation was to be subtracted. *See Continental Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir.1985); *American Pacific Concrete Pipe Co. v. NLRB*, 788 F.2d 586, 590-91 (9th Cir.1986) (agreeing with *Continental Web*).

The district court, relying on the legislative history connected with the 1985 addition,[3] reasoned that Congress was concerned with "ability to pay" and thus agreed with Brunswick's view that "restricted assets" were to be excluded when calculating Brunswick's net worth. *See* 661 F. Supp. at 1440. We disagree.

Congress determined that only those units of local government whose net worth did not exceed $7 million at the time of suit could receive an award under EAJA. We believe that the choice of the $7 million figure represents Congress' concern with the "ability to pay" factor. We discern from the legislative history that Congress, already having taken "ability to pay" into account by its choice of the $7 million figure, intended "net worth" to be determined by subtracting total liabilities from total assets. Congress thus did not intend for "ability to pay" to enter into the calculation of net worth.[4] We thus reject the argument that "restricted" assets should be excluded from that calculation.

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3. Congress expressly added units of local government in the 1985 Amendments because the House Judiciary Committee believe[d] that small governmental units face the same inherent problems and deterrence factors as do small private businesses when involved in adversary adjudications or litigation with the United States. For example, units of local government are frequently involved in disputes with the Federal Government concerning questions of eligibility and implementation under a variety of Federal assistance programs.

   H.R.Rep. No. 120, 99th Cong., 1st Sess. 15 (part 1), *reprinted in* 1985 U.S.Code Cong. & Admin. News 132, 143.

4. This conclusion accords with the rule of statutory construction that waivers of sovereign immunity, as EAJA is, are to be construed narrowly and in favor of the sovereign.

Rather, we agree with the government's expert that the critical consideration for inclusion as an asset is whether the City has title to the asset.[5] It is undisputed that Brunswick held title to the water and sewage system. This system thus is to be included in the "net worth" calculation. Consequently, Brunswick's "net worth" clearly exceeded EAJA's limit and Brunswick cannot recover for an award under EAJA.

II. *"Substantially Justified"*

The Equal Access to Justice Act provides in relevant part:

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust.

28 U.S.C.A. § 2412(d)(1)(A) (emphasis added). In the present case, the district court determined that FEMA's

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5. *See generally* Affidavit of Edward J. Haller (May 21, 1987), *attached to* Memorandum in Support of Defendants' Motion to Alter or Amend the Court's Judgment on Attorneys' Fees, Costs, and Expenses (June 5, 1987) (R7:176). Brunswick contends that, by excluding pension assets from inclusion in Brunswick's total assets, the government's expert recognized that "restricted" assets were excluded from the "net worth" calculation. As the government's expert correctly pointed out, pension assets were excluded because Brunswick did not have title to them. *See id.* at 3.

original agency action[6] was not substantially justified. Consequently, the district court determined that Brunswick was entitled to an award under EAJA.

We review the district court's finding for abuse of discretion. The government bears the burden of showing that its position was substantially justified. The standard for substantial justification is one of "more than mere reasonableness." The government must show that its case had a reasonable basis both in law and fact. *Hudson v. Secretary of Health and Human Services,* 839 F.2d 1453, 1456 (11th Cir.1988); *accord United States v. Certain Real Estate Property,* 838 F.2d 1558, 1561 (11th Cir. 1988). As an alternative holding to our determination that Brunswick failed to meet EAJA's "net worth" requirement, we conclude that the district court abused its discretion when it held that the position of the United States was not "substantially justified."

A. *The Government's Position at the Agency Level*

Brunswick sought flood insurance available to property owners at subsidized rates.[7] 42 U.S.C.A. §§ 4011, 4012(c). The Federal Emergency Management Agency sought to perform a flood insurance study (FIS) and

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6. Congress has made it clear that "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action was based. *See, e.g., Hudson v. Secretary of Health & Human Services,* 839 F.2d 1453, 1456 n. 2 (11th Cir. 1988).

7. We use the district court's statement of facts, *see* 661 F.Supp. at 1433-36, as a guide to part of our rendition of the relevant facts.

then to create a flood insurance rate map (FIRM). *Id.* §§ 4101, 4104.

FEMA employed a private engineering firm to perform the FIS for Brunswick and the surrounding tri-county area. On July 14, 1982, Brunswick was provided copies of the FIS and draft FIRMs for information and review. The documents, which notified Brunswick of the proposed base flood elevations (BFE),[8] were subsequently published in *The Brunswick News* on August 25, 1983, and September 1, 1983.

In November 1983, Brunswick authorized Glynn County, Georgia, to prosecute an appeal to FEMA on Brunswick's behalf from the proposed BFEs. Later that month, pursuant to 42 U.S.C.A. § 4104(c),[9] Glynn County filed a timely joint appeal on behalf of itself and Brunswick. The joint appeal challenged (1) the technical interpretation of field survey data used to determine wave transmission coefficients and (2) whether the effect of wave heights of nonrigid herbaceous vegetation was considered.

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8. The BFE is the estimated water level of a "flood having a one percent chance of being equaled or exceeded in any given year." The BFE affects both the insurance rates to be charged and the permissible types of construction in flood-risk zones.

9. Section 4104(c) provides in relevant that "the community's appeal . . . shall be filed with the Director [of FEMA] not later than ninety days after the date of the second newspaper publication of the Director's notification."

On November 1, 1984, pursuant to its duty under 42 U.S.C.A. § 4104(e),[10] FEMA sent its response by certified mail/return receipt requested to Reginald E. Holtzendorf, Mayor of Brunswick.[11] In this response, FEMA determined that no adjustments to the wave transmission coefficients were warranted and some site-specific reductions because of marsh grass effects were warranted in the BFEs. FEMA enclosed a revised FIRM and stated that Brunswick had thirty days to review and comment on the enclosed maps. Brunswick did not submit additional scientific or technical data.

On December 19, 1984, FEMA notified Brunswick[12] by certified letter that the final FIRM would go into effect on June 19, 1985, and that Brunswick had six months to adopt appropriate ordinances regulating development in the flood-risk areas. At this point, 42 U.S.C.A. § 4104(g) (emphasis added) became applicable: "Any appellant ag-

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10. Section 4104(e) provides in relevant part:

> Upon appeal by any community . . . the Director shall review and take fully into account any technical or scientific data submitted by the community that tend to negate or contradict the information upon which his proposed determination is based. The Director shall resolve such appeal by consultation with officials of the local government involved, by administrative hearing, or by submission of the conflicting data to an independent scientific body or appropriate Federal agency for advice. . . . The Director shall make his determination within a reasonable time.

11. Brunswick stated in its complaint that Holtzendorf was not the mayor at that time. *See* R1-1-7 para. 21. Even assuming Brunswick did not receive the notice, agency regulations require the community to tell FEMA what local official is in charge of flood insurance matters.

12. FEMA sent this notification to Holtzendorf. Brunswick admitted that it received this notification. *See* R3-90-6.

grieved by any final determination of the Director upon administrative appeal . . . may appeal such determination to the United States district court for the district within which the community is located not more than *sixty days* after receipt of notice of such determination."

Although Brunswick's right to judicial review lapsed in February 1985, Brunswick did not respond to FEMA's notice until May 1, 1985. Brunswick presented its response at the agency level. Brunswick sought a nine-month extension of the FIRM's effective date, claimed that the FIS was technically deficient, and asserted that FEMA should have conducted an environmental impact statement (EIS) for the Brunswick area. FEMA refused to grant the extension, stated that an EIS was not required, permitted Brunswick to submit additional flood data (which Brunswick did), and did not alter the FIS or FIRM.

We hold that "the position of the United States" at the agency level was "substantially justified." FEMA followed the procedures outlined in the relevant portions of 42 U.S.C.A. § 4104. FEMA advised Brunswick of the right to respond to the proposed BFEs. Brunswick, jointly with Glynn County, challenged two aspects of the proposed BFEs.[13]. FEMA, pursuant to its statutory duty, addressed Brunswick's challenges and informed Bruns-

13. In its complaint, Brunswick stated that at the time of the joint appeal, "and up until April, 1985, [it] did not realize that Glynn County did not have and had not employed anyone with sufficient expertise properly to evaluate the FIS's [sic] and to assist in an appeal involving this abstruse and complex technology." *See* R1-1-7 para. 20. This allegation has no relevance to our inquiry of whether the government's position was substantially justified.

wick that Brunswick had thirty days to respond before FEMA would finalize the BFEs. Brunswick did not respond. FEMA then made its final determinations and so notified Brunswick. Well outside of the two-month period for *judicial* review, Brunswick sought, before the *agency*, additional relief, which was denied in large part.

When a community has had two previous opportunities to challenge the accuracy of the FIS and the community, after FEMA's final determination and after the time period for judicial review has lapsed, seeks to present new challenges to the FIS, the agency is substantially justified in refusing to grant an extension of the FIRM's effective date and in refusing to modify the FIS. As the district court recognized when ruling on a timeliness challenge to a claim in Brunswick's subsequent suit:

> If a community could come forth with piecemeal objections to an FIS over an extended period of time, FEMA could never implement a final rate map, and the Congressional policy underlying the [Flood Insurance] program would be thwarted. Indeed, Congress undoubtedly foresaw this problem when it deliberately limited appeals in order to avoid "the pitfall of permitting those unnecessary delays and self-interested procrastinations which would make the flood insurance program unworkable."

City of Brunswick v. United States, No. 285-142, slip op. at 10 (S.D.Ga. Jan. 9, 1986) (quoting 119 Cong.Rec.42,885 (1973) (statement of Rep. Barrett)). FEMA thus was substantially justified in its conduct when, as here, it declined to allow a community to avoid the proper appeals process and engage in piecemeal litigation. Consequently, the district court erred when it focused on whether FEMA

was substantially justified as to the accuracy of the FIS. *See* 661 F.Sup. at 1441-42. Rather, the true agency action giving rise to Brunswick's suit was FEMA's refusal to grant an extention of the FIRM's implementation and re-examine the FIS.

B. *The Government's Pre-Stipulation Litigation Position*

On July 16, 1985, Brunswick filed suit against FEMA, seeking to enjoin the agency from implementing the FIRM and requesting declaratory relief on the basis of the following contentions: (1) that the proposed BFEs were inaccurate, (2) that FEMA was obligated to perform a site-specific EIS before implementing a FIRM, (3) that FEMA violated its own regulations by failing to conduct notice-and-comment rule making on the methodology to be used in performing the FIS, and (4) that FEMA unlawfully delegated critical fact-finding functions to a private entity (i.e.,the private engineering firm) without exercising meaningful supervision over its work.

On January 9, 1986, the district court granted the government's summary judgment motion as to the first count. The district court reasoned that it lacked subject matter jurisdiction because Brunswick had failed to apply for judicial review of final agency action within 60 days as required by 42 U.S.C.A. § 4104(g). The other three counts survived for decision at trial. Before trial, the parties reached a court-approved settlement stipulation that they would submit any unresolved issues regarding FEMA's performance of the FIS to an arbitration panel of experts. FEMA agreed to modify the FIRM if the arbitration panel reached new base flood elevations.

We hold that "the position of the United States was substantially justified" at this point in the litigation.[14] As set forth above, Brunswick sought relief on four grounds, and the district court determined that Brunswick's challenge to the accuracy of the FIS was time-barred. Upon Brunswick's motion for attorney fees, the district court concluded that the government was "substantially justified" in its defense of the other three claims. *See* 661 F.Supp. at 1442-43. Brunswick does not suggest otherwise on appeal.[15]

C. *The Government's Post-Stipulation Litigation Position*

On June 12, 1986, the arbitration panel submitted its report. *See* R4:130 [hereinafter Arbitrators' Report]. The report required the establishment of the new BFEs and led FEMA to issue a new FIRM. The district court determined that, based on the arbitrators' report, FEMA was not substantially justified based on its performance of the FIS and FIRM. *See* 661 F.Supp. at 1442.

The district court abused its discretion by examining only the accuracy of the FIS. As discussed above, Brunswick, through its joint appeal with Glynn County, had chal-

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14. We note that the government was substantially justified in entering into the stipulation because three contested issues were removed from the case.

15. Our holding as to the government's pre-stipulation litigation position does not end our inquiry. *Porter v. Heckler*, 780 F.2d 920, 923 (11th Cir.1986) (quoting *Environmental Defense Fund, Inc. v. Watt*, 722 F.2d 1081, 1086 (2d Cir.1983)), teaches that "it is 'incumbent upon the government to abandon its opposition to the other party as soon as it becomes apparent that its litigation stance is not substantially justified.' "

lenged the accuracy of the FIS at the agency level. Only after the time for judicial review had lapsed did Brunswick seek to challenge the FIS on those grounds raised before the arbitration panel, and FEMA was substantially justified in refusing to reexamine the merits of the FIS.

The district court should have focused on FEMA's response to the merits of Brunswick's challenge. Because Brunswick's challenge was not timely, FEMA had no duty to respond to the merits of that challenge until the stipulation caused the merits to become the focus before the arbitration panel. Consequently, the government had to be "substantially justified" in the position it took before the arbitration panel.

Brunswick presented to the arbitration panel challenges to four aspects of the FIS: (1) selection and use of storm data, (2) wave height analysis, (3) use of the TTSURGE model, and (4) topography. Our review of the arbitrators' report and its supporting documents demonstrates that the government was substantially justified in the position it took before the arbitration panel. First, the panel credited the testimony by government witnesses and determined that the government's wave height analysis was properly conducted. *See* Arbitrators' Report at 18. Second, the panel adopted the conclusions of the government's witness as to pressure distribution and nineteenth century storm data. *See id.* at 12-13, 29, Third, FEMA acknowledged that the central pressure distribution of exiting storms should differ from those of entering and alongshore storms, that proper use of storm frequencies would tend to raise flood elevations, and that errors in the FIS related to joint probability calculations should be

corrected in determining new BFEs. *See id.* at 7-8, 25. Fourth, FEMA promised to incorporate into the FIRM Riverside data supplied by Brunswick. *See id.* at 26. Finally, although the arbitration panel did not agree entirely with the position taken by the government before it, our review of the record indicates that the government was substantially justified in the position it took. The district court abused its discretion by focusing on the accuracy of the FIS, instead of focusing on the position the government took before the arbitration panel.

Accordingly, we REVERSE the district court because Brunswick did not meet EAJA's "net worth" requirement. We also REVERSE the district court because "the position of the United States was substantially justified."

The CITY OF BRUNSWICK, GEORGIA, Plaintiff,

v.

UNITED STATES of America, et al., Defendants.

Civ. A. No. 285-142.

United States District Court, S.D. Georgia, Brunswick Division.

May 20, 1987.

ORDER

ALAIMO, Chief Judge.

Plaintiff, the City of Brunswick, Georgia ("Brunswick"), seeks to recover attorney fees, costs and other expenses incurred in this litigation against the United States, the Director of the Federal Emergency Management Agency and the Administrator of the Federal Insurance Administration as defendants (collectively, "FEMA"). Plaintiff contends that it is eligible for an award of such costs under the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"), other relevant statutes and at common law. In sum, Brunswick requests an award of $477,984.11. Defendant maintains that plaintiff is not eligible for *any* award under the EAJA but that, if any award is made under the EAJA or other statutes, it should be substantially reduced. The Court finds that Brunswick is entitled to an award in the amount of $312,876.10 for attorney fees and other expenses, and $11,616.05 for costs.

FACTUAL BACKGROUND

This case began as a technical dispute over "base flood elevations" and culminated in a legal grudge-match over attorney fees. A historical overview is necessary to set the dispute in its current context. The lawsuit arose out of Brunswick's challenge to FEMA's determination of the flood level figures used in calculating Brunswick's eligibility for federally subsidized flood insurance.

A comprehensive statutory scheme governs the availability of federally subsidized flood insurance. After completing a study on the feasibility of a national program of flood insurance, Congress enacted the National Flood Insurance Act of 1968, Pub.L. 90-448, 82 Stat. 572 (1968), and the Flood Disaster Protection Act of 1973, Pub.L. 93-234, 87 Stat. 979 (1973), *codified as amended,* 42 U.S.C. § 4001 *et seq.* (1982). This legislation aimed to combine the incentive of federally subsidized flood insurance with the requirement that communities receiving such insurance carefully control the development of land historically likely to be visited by floods. In addition, the purchase of such insurance is made a precondition of receiving federal assistance for any construction in certain high-risk areas.

Brunswick sought to be included in the National Flood Insurance Program in 1974, thereby triggering the availability of flood insurance to property owners at subsidized rates. 42 U.S.C. §§ 4011, 4012(c). At the same time, Brunswick's application set into motion FEMA's performance of a flood insurance study ("FIS") and the subsequent creation of a flood insurance rate map ("FIRM"). 42 U.S.C. §§ 4101, 4104.

The purpose of the FIS is to identify "flood plains," such as "coastal areas in the United States which have special flood hazards," and to establish "flood risk zones" and "make estimates with regard to probable flood-caused loss" for these zones. The results of the FIS are then "translated" onto a FIRM, which is an official map of the community delineating the "special hazard areas and risk premium zones applicable to the community." 44 C.F.R. § 59.1 (1986). In order to calculate actuarially sound insurance rates for flood-risk zones, FEMA makes reference to a variable called the "base flood elevation" ("BFE"), which is the estimated water level of a "flood having a one percent chance of being equalled or exceeded in any given year." The BFE, therefore, has an impact both on the insurance rates to be charged and on the kinds and costs of construction to be permitted in flood-risk zones.

Following the promulgation of a final FIRM, a participating community must enact a "flood plain management" ordinance to regulate the development of new or improved structures in high-risk areas. 42 U.S.C. §§ 4012(c), 4022, 4102. If the community fails to establish a local ordinance meeting the minimum safety standards set by FEMA, it will lose the benefit of subsidized insurance. 44 C.F.R. § 60.3. A prime example of those safety standards is the requirement that new or substantially improved buildings be erected at or above the BFE's shown on the FIRM. 44 C.F.R. § 60.3(c).

FEMA employed a private engineering firm in Virginia—Camp, Dresser & McKee ("CDM")—to perform the FIS for Brunswick and the surrounding tri-county

area. On December 19, 1984, FEMA notified Brunswick by certified letter that the final FIRM would go into effect on June 19, 1985, and that the City had six months to adopt appropriate ordinances regulating development in the flood-risk areas. Brunswick neglected to respond to FEMA's notice of December 1984 until May 1, 1985, apparently because of an inadvertent failure to read the notice until that time. On May 1, 1985, the City requested a nine-month extension of the FIRM's effective date and asserted both that the FIS was technically deficient and that the FIRM should not be imposed without FEMA's first conducting an environmental impact statement ("EIS") for the Brunswick area. FEMA refused to grant an extension, but invited Brunswick to submit additional flood data, which the City did. FEMA also stated its belief that an EIS was not required prior to the implementation of a FIRM.

In order to avoid being terminated from the flood insurance program, Brunswick imposed an indefinite moratorium on building permits within the high-risk flood areas of the FIRM.

On July 16, 1985, Brunswick filed this suit against FEMA seeking to enjoin the agency from implementing the FIRM and requesting declaratory relief on the basis of the following contentions: (1) that the proposed flood elevations were hopelessly inaccurate; (2) that FEMA was obligated to perform a site-specific EIS before implementing a FIRM; (3) that FEMA violated its own regulations by failing to conduct notice-and-comment rule making on the methodology to be used in performing a FIS; and (4) that FEMA unlawfully delegated critical

fact-finding functions to a private entity (CDM) without exercising meaningful supervision over its work.

On August 16, 1985, the Court approved a discovery plan worked out by the parties in connection with Brunswick's request for a preliminary injunction. Discovery proceeded during the following months, with a variety of problems arising which required the repeated intervention of the Court. Each party filed proposed findings of fact and conclusions of law. By late December of 1985, the parties were earnestly engaged in settlement discussions, and a tentative trial date had been set for January 2, 1986. By Order of January 9, 1986, having reviewed FEMA's motion for summary judgment, the Court dismissed Brunswick's count seeking judicial review of FEMA's flood insurance rate map because Brunswick had failed to apply for review within the statutory time limit set by 42 U.S.C. § 4104(g), which requires that final agency determinations be appealed within 60 days. The Court, therefore, dismissed the count seeking judicial review of agency action from the complaint for lack of subject matter jurisdiction. At oral argument, the Court had previously denied FEMA's motion for summary judgment as to the remainder of Brunswick's complaint, which survived to be decided at trial.

On January 29, 1986, the parties reached a settlement stipulation which the Court approved. In substance, the settlement agreement provided that the parties would submit any unresolved issues regarding FEMA's performance of the FIS to an arbitration panel of experts. The panel would decide issues submitted to it by the City and its decision would be accepted as final. The agreement also

provided a method for the selection of arbitrators. FEMA agreed to modify the FIRM if the arbitration panel reached new base flood elevations. Any new FIRM reflecting the panel's new base flood elevations would become effective by Order of the Court. Brunswick and FEMA agreed to bear the costs of implementing the settlement agreement equally, but Brunswick also promised to make application for an award of attorney fees and costs within 30 days of the conclusion of the settlement process. FEMA did not concede that Brunswick was entitled to any such award.

By March 21, 1986, the arbitration panel was selected and ready to begin deliberations. The Court met with the arbitrators on that date and discussed with them the nature of their duties. In the conference, the Court clearly defined the scope of their inquiry. The Court stated: "The main object is to see that the flood elevation is correct . . . I want you to come up with the BFE. . . . That is what this is all about." The Court's colloquy with the arbitrators sheds light on the view the arbitrators themselves took of their duty. Richard Tomasello, an arbitrator, suggested that their most difficult task would be to determine the effect on the final BFE if they should discover that "some element of the study that was done originally was totally in error. . . ."

On June 12, 1986, the arbitration panel submitted its report, which found a variety of errors in FEMA's methodology requiring the establishment of new BFE's and leading to the issuance of a new FIRM by FEMA. Although FEMA at first objected to the panel's findings, it later withdrew its objection and issued a new FIRM on

October 24, 1986. The Court entered an Order making the new FIRM effective on October 30, 1986.

On November 14, 1986, Brunswick filed a motion stating that it had substantially received the relief it sought and requesting an award of costs, expenses and attorney fees under a variety of statutes and equitable theories, including 28 U.S.C. § 2412, the EAJA. The motion contained itemized estimates of each of these costs, and stated that the requested fees and expenses would be set forth more specifically in a supplement, as allowed under Local Rule 11.2(c). Local Rule 11 provides that motions for costs must be filed by a prevailing party within 30 days after a final judgment. Rule 11.2(c) states that the motion:

> shall specify the judgment and the statute or other grounds on the basis of which entitlement to the award is claimed and shall state the amount (or provide a fair estimate of the approximate amount) of the fees and expenses sought. Within 30 days (or such other period as the Court may prescribe) after filing the motion, the movant shall file and serve a detailed specification and itemization of the requested award, with appropriate affidavits and other supporting documentation.

Brunswick filed a supplement to its motion for attorney fees, costs and expenses on December 18, 1986. After FEMA's initial attempts to bifurcate the case and to interpose threshold defenses were rejected by the Court, FEMA's full response and memorandum in opposition to the award of fees were filed on February 18, 1987. Since that time, each party has filed a variety of replies and counter-replies, whose volume and complexity have rivaled that of the proceedings on the merits. The Court heard oral argument on the fee petition on April 28, 1987.

DISCUSSION

I. Attorney Fees and Other Expenses Under the EAJA

(A) Threshold Requirements

The EAJA sets eligibility requirements for parties seeking to recover attorney fees, costs and other expenses under 28 U.S.C. § 2412. For example, § 2412(d)(1)(A) provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of the action, unless the court finds that the position of the United States was substantially justified. . . .

Thus, no award is available under the EAJA as a threshold matter unless the party seeking the award "prevailed" in the underlying litigation.

Section 2412(d)(1)(B) also prescribes certain requirements which an EAJA applicant must follow. First, the party must submit its application for fees and other expenses within 30 days of a "final judgment." Second, § 2412(d)(1)(B) describes the substantive requirements governing the content of the application. Specifically, the application must show:

> —that the party is a prevailing party and is eligible to receive an award under this subsection, and
>
> —the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed.

This section further requires that the award-seeking party "allege that the position of the United States was not substantially justified." The issue of "whether or not the position of the United States was substantially justified shall be determined on the basis of the record . . . which is made in the civil action for which fees and other expenses are sought."

In summary, under § 2412(d)(1)(B), an applicant must meet the threshold requirement of filing his application in a timely manner and ensuring that the application contains the elements described above.

Other examples of threshold eligibility requirements may be found in the definitional component of the EAJA, codified in § 2412(d)(2). For instance, § 2412(d)(2)(B) defines the term "party" as "any . . . unit of local government or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed. . . ." This definition precludes any local governments with a "net worth" in excess of $7,000,000 from seeking attorney fees or other expenses under the EAJA.

From the preceding review of the statute, it is evident that the EAJA imposes at least three threshold requirements upon a party seeking an award of fees and other expenses: (1) the applicant must be a prevailing party; (2) the application must be timely filed within 80 days of a final judgment and must also contain certain information; (3) the applicant, if a unit of local government, must have a net worth of less than $7,000,000 at the time the underlying suit was filed. In contesting Brunswick's eligibility for an award under the EAJA, FEMA asserts that Brunswick failed to meet each of these threshold require-

ments. Accordingly, the Court will consider each contention in turn.

(1) Prevailing Party

The law in this Circuit is unmistakably clear that a party "prevails" for the purposes of the EAJA when "he or she has received substantially the relief requested or has been successful on the central issue." *Martin v. Heckler,* 773 F.2d 1145, 1149 (11th Cir.1985) (en banc); *quoting Watkins v. Mobile Housing Board,* 632 F.2d 565, 567 (5th Cir. Unit B, 1980). Stated another way, the prevailing-party test is whether "plaintiff's lawsuit was a catalyst motivating defendants to provide the primary relief sought in a manner desired by litigation." *Martin, supra, quoting Robinson v. Kimbrough,* 652 F.2d 458, 465 (5th Cir.1981). That a party succeeds in obtaining relief as a result of a consent judgment, an out-of-court settlement or a voluntary cessation of the unlawful conduct does not prevent that litigant from being considered a prevailing party. *Doe v. Busbee,* 684 F.2d 1375, 1379 (11th Cir. 1982).

Although the *Martin* Court construed the term "prevailing party" as it is found in both the EAJA and the Civil Rights Attorneys Fee Awards Act, 42 U.S.C. § 1988, the court treated the terms as legally synonymous. District courts applying *Martin* have done the same. *U.S. v. Certain Real Property Located at 4880 S.E. Dixie Highway,* 628 F.Supp. 1467, 1469 (S.D.Fla.1986) (applying the *Martin* prevailing-party test to an EAJA litigant); *York v. Alabama State Board of Education,* 631 F.Supp. 78,83 (M.D.Ala.1986) (applying *Martin* to § 1988 litigants). Moreover, this Circuit has specifically held that a party

who secures a favorable settlement or consent decree from the United States qualifies as a prevailing party under the EAJA alone. *National Treasury Employees Union v. I.R.S.*, 735 F.2d 1277, 1278 (11th Cir.1984).

FEMA contends in this case that Brunswick did "not receive 'substantially the relief requested,' nor was it successful 'on the central issue,' nor was its lawsuit a catalyst in obtaining 'the primary relief sought.'" For the following reasons, the Court disagrees.

Brunswick brought this lawsuit to delay and ultimately prevent the implementation of what it considered an inaccurate FIRM; the City's apparent goal was to force a revision of the FIRM based on what it considered more accurate information. As a result of a court-supervised settlement and arbitration process, the original FIRM *was* indeed found to contain inaccuracies and was replaced by a new FIRM which Brunswick alleges is more in line with the City's needs. Although the Court lacks the scientific expertise to discern whether the altered base flood elevations in the revised FIRM are technically without flaw, it is manifest in the opinion of the Court that this lawsuit *was* a "catalyst motivating defendants to provide the primary relief sought in a manner desired by litigation." *Robinson v. Kimbrough, supra* at 465. It was the lawsuit which induced FEMA to accept binding arbitration and a reconsideration of the FIRM, and arbitration which resulted in the implementation of a FIRM more favorable to plaintiff. Under these circumstances, Brunswick is a prevailing party under the EAJA.

(2) Timely Application

Plaintiff's motion for an award of attorney fees, costs and other expenses was filed on November 14, 1986. The motion alleged that Brunswick was the prevailing party in this case, that final judgment was entered on October 30, 1986, by the Court's Order approving the final FIRM and that Brunswick was entitled to an award of costs under the EAJA and other statutes. Plaintiff's motion also contained an itemized list of estimated costs and expenses, and stated that the motion was filed in conformance to this Court's Local Rule 11.2(c), which allows parties seeking attorney fees to provide a fair estimate of the fees and expenses sought and requires the movant to file "a detailed specification and itemization of the requested award within 30 days of filing the original motion."

Throughout the remaining stages of this fee litigation, even after the Court held in its Order of February 3, 1987, that the fee application *was* timely filed, the Government has continued to press the argument that plaintiff's original application was not timely filed because it did not contain all of the elements described in 28 U.S.C. § 2412(d)(1)(B). For example, defendant charges that the November 14 application was incomplete because it did not "state the actual time expended and the rate at which fees and other expenses are computed;" and that the original motion did not specifically allege that "the position of the United States was not substantially justified." Carrying this analysis to its conclusion, defendant contends that Brunswick's later supplemental brief, which did contain the elements specified in § 2412(d)(1)(B), was untimely filed on December 18, 1986, because it was more than 30

days after the Court's settlement Order of October 30, 1986.

In its Order of February 8, 1987, the Court found that the December 18 filing was timely under the rule announced in *James v. U.S. Dept. of Housing and Urban Development,* 783 F.2d 997 (11th Cir. 1986). The Court read the *James* case as holding that the EAJA's definition of a final judgment means a judgment which is "no longer 'subject to attack.'" *Id.* at 999. Since an "order of settlement," by definition under the EAJA, is included in the meaning of "final judgment," the Court reasoned that the *James* rule, which tolled the EAJA's 30-day filing period for the filing of fee applications until the expiration of the period in which the Government may file its appeal, ought to apply to an order of settlement as well.

The Government here conceded at oral argument it was not certain whether the settlement Order in the instant case was appealable. The *James* case clearly holds that, where a judgment is appealable, it is not final for purposes of the EAJA until "the date on which a party's case has met its final demise, [until] there is nothing further the party can do to give it life." *Id.* at 999. FEMA contested the findings of the arbitration board in this case, alleging certain errors. Although FEMA withdrew its objection before the Court ordered the implementation of the final FIRM on October 30, 1986, Brunswick reasonably could have expected that FEMA might attempt to appeal the settlement Order. That FEMA now contends that it "could not have 'appealed' from this Order without overturning the entire settlement agreement," does not detract from the force of Brunswick's argument. Because FEMA

filed no waiver of appeal, the "finality" of the settlement Order was arguably open to question until the expiration of the 60-day period the Government had in which to file its appeal. Consequently, as this Court stated in its Order of February 3, 1987, if the *James* rule is applied to this settlement Order, plaintiff's December 18, 1986, brief was both statutorily complete and timely filed. This result obtains because, under the *James* rule, plaintiff's December 18 brief was filed during the 60-day appeals period and before the 30-day EAJA period had started running.

FEMA draws the Court's attention to a footnote which appeared in the House Report on the EAJA, as support for the view that Congress intended the 30-day period to begin running "on the date when the proceeding is dismissed pursuant to the settlement or when the adjudicative officer approves the settlement." H.Rep. No. 99-120, 99th Cong., 2d Sess. at 18 n. 26 (1985), *reprinted in* 1985 U.S.Code Cong. & Ad. News 132, 146 n. 26. Interestingly, the language cited by the Government is followed by this explanation:

> Thus, if the Government does not appeal from an adverse decision, the thirty day period would begin to run upon the expiration of the time for filing notice of appeal. . . .

Id. The Report does not indicate whether a settlement Order could be considered an "adverse decision," as described in the above paragraph. Accordingly, the Court is unpersuaded that the intent of Congress would be thwarted by an application of the *James* rule to the instant case.

However, even assuming for the sake of argument that the Court's Order of February 3, 1987, should be recon-

sidered, the Court is confident that the same result would be supported by alternative legal authority. In *Dunn v. United States,* 775 F.2d 99, 104 (3d Cir.1985), the court held that a statutorily incomplete EAJA fee application filed within 30 days of a final judgment is timely; and later supplemental filings curing the application's deficiencies relate back to the original filing date. In *Dunn,* the plaintiffs filed an application for fees under the EAJA within the statutory period, but failed to include "a specific amount of fees requested, [or] an itemized statement of the actual time expended and the rate at which fees and expenses are computed," *Dunn, supra* at 101. The court nevertheless reversed a district court's holding that it lacked jurisdiction over the fee petition because plaintiffs failed to include in their application all the statutory elements of 28 U.S.C. § 2412(d)(1)(B).

The Third Circuit Court of Appeals drew a distinction between the "filing requirement" of § 2412(d)(1)(B), which mandates that fee petitions must be filed within 30 days, and the "pleading requirement," which sets out the necessary elements to be included in any EAJA fee petition. In reasoning that the purposes of notice, proof of timeliness and finality, and reliance were adequately served by the timely filing of the application itself, the Third Circuit observed: "It is not immediately apparent that Congress intended that strict compliance with the pleading requirement must be accomplished within the same time as filing." *Id.* at 103. Noting that "Congress was not concerned with the time within which the affected government agencies received information about the details of a fee claim," the court summarized its holdings as follows:

> Thus we conclude that Congress did not intend that defects in the pleading requirements of section 2412(d)(1)(B) be treated as jurisdictional. So long as a fee petition is filed within the thirty-day period which puts . . . the government on notice that the petitioner seeks fees under the [EAJA], the court may consider the petition, and may, absent prejudice to the government or noncompliance with court orders for timely completion of the fee determination, permit supplementation.

Id. at 104. *But see* Adams, J., *dissenting*, 775 F.2d 99, 105 (3d Cir.1985).

FEMA contends that failure to file within the 30-day time limit deprives the district court of jurisdiction under this Circuit's decision in *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1494 (11th Cir. 1986). The Court recognizes that compliance with the 30-day limit is indeed characterized as a "jurisdictional" requirement in *Haitian Refugee Center*. However, as explained above, once an applicant has complied with the requirement of filing within 30 days, his failure to provide all of the information described in § 2412(d)(1)(B) may be cured by a supplemental filing.

This approach comports with this Court's Local Rule 11, which expressly allows parties seeking attorney fees to supplement cost estimates contained in fee applications. Plaintiff relied on Local Rule 11.2(c) in its application for fees because that Rule permits a filing party to serve a "detailed specification and itemization of the requested award" within 30 days of filing the original petition. Failing to allow supplementation in this case would be patently unfair on these facts, and the Court declines to do so.

Taken as a whole, all of the above-cited authority compels a finding that this fee application was timely filed under the EAJA.

(3) Statutory Net Worth

To be eligible for an award of fees under the EAJA, a party must also meet the financial limitations set forth in 28 U.S.C. § 2412(d)(2)(B). That section allows a unit of local government to qualify as an eligible party provided that its "net worth . . . did not exceed $7,000,000 at the time the action was filed." 28 U.S.C. § 2412(d)(2)(B). The issue of Brunswick's net worth at the time this action was filed has been hotly contested by the parties, with each side proferring affidavits of respected and experienced accountants who attest with professional certainty that, under "generally accepted accounting principles" Brunswick's net worth was under $7,000,000 (according to plaintiff's accountants) and over $20,000,000 (according to defendants' accountants) on July 15, 1985.

The difficulty here was aptly framed by counsel for the Government at oral argument when he explained in answer to a question from the Court that a city's "net worth" is simply not defined under "generally accepted accounting principles." This is because the term "net worth" is not normally used with reference to the financial status of a municipality.

The legislatve history of § 2412(d)(2)(B) offers little definitional clarification, stating only that "net worth" is calculated by subtracting total liabilities from total assets. H.Rep. No. 96-1418, 96th Cong., 2d Sess. at 15 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad.News 4984, 4994.

However, certain language from the House Report on the 1985 amendment to the EAJA lends support to the plaintiff's view that "restricted assets" (those not generally available to meet the payment of debts) ought not to be considered in determining net worth.

Congress' intent in placing financial limits on a party's eligibility to recover fees under the EAJA was to ensure that the benefit of fee awards would go only to those parties whose financial condition might otherwise deter them from asserting their rights. In short, Congress tailored the law to protect those unable to afford to litigate against the Government. Thus, the 1980 House Report states that the purpose of the net worth requirement is to "limit the bill's applications to those persons and small businesses for whom costs may be a deterrent to vindicating their rights." 1980 U.S.Code Cong. & Ad.News 4953, 4994. Likewise, when Congress amended the definition of a party to include local units of government, it noted that "small governmental units face the same inherent problems and deterrence factors as do small private businesses when involved with adversary adjudication or litigation with the United States." 1985 U.S.Code Cong. & Ad.News 132 at 143.

Given the apparent dearth of tangible standards for determining the "net worth" of cities such as Brunswick, and considering the fact that the accounting methodology adopted by plaintiff's accountants seems to be more consistent with the Congressional focus on ability to pay, the Court accepts the plaintiff's version of Brunswick's net worth. Adopting the approach of defendant's accountant would seem to undercut the Congressional policy of re-

moving the financial deterrent to litigation against the national government. A city that could not afford to litigate as a practical matter might still be disqualified because the Government's accounting methods would include, in calculating the city's worth, assets which are not generally available to meet the city's obligations.

Since plaintiff's accountants use methods focusing more closely on actual *ability to pay,* which seems to be consistent with the Congress' concerns over the deterrent effect of high-cost litigation, the Court accepts their valuation of Brunswick's net worth as of July 15, 1985. Accordingly, Brunswick's net worth meets the requirements of the EAJA.

(B) Substantial Justification

The EAJA directs the Court to award attorney fees to a prevailing party in an action against the Government "unless the Court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The "position of the United States" is defined in the Act as "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D). Thus, in attempting to make a finding as to whether the Government was substantially justified, the Court may consider both the substantive agency action taken by FEMA and the legal positions advanced by the United States. The Government bears the burden of proof in showing that its position was substantially justified or, in other words, "that its case had a reasonable basis both

in law and fact." *Haitian Refugee Center, supra* at 1497. Because Congress rejected the term "reasonably justified" and chose "substantially justified" instead, the test is actually more than mere reasonableness. *Id., see also Spencer v. NLRB,* 712 F.2d 539, 557-58 (D.C.Cir.1983).

(1) FEMA's Original Agency Action

FEMA seeks to restrict the scope of the substantial justification inquiry by contending that the Court may not take into account the substantive accuracy of FEMA's FIS in determining whether the agency action here was substantially justified. This contention rests on the theory that, because the Court in its Order of January 9, 1986, dismissed Brunswick's count seeking judicial review of the FIS and FIRM, the Court may not now review them to determine whether they were substantially justified. Although defendant's argument has the allure of technical precision, it ignores the practical reality of the case. Defendant did succeed on summary judgment on plaintiff's count seeking judicial review of the FIS and the FIRM, but plaintiff's other counts—charging serious mismanagement and procedural improprieties—remained in the case and would have been resolved at trial.

Rather than undergo a trial on the merits of the remaining issues, FEMA knowingly waived its right not to have the FIS and FIRM examined and, instead, submitted the issue of their accuracy to arbitration carried out under supervision of the Court. Since FEMA elected to enter into a settlement agreement which placed the FIS and the FIRM squarely before the Court's arbitration panel, it cannot now be heard to complain that the substantial justi-

fication of this agency action is outside the permissible scope of the Court's review.

The viewpoint finds support in the relevant legislative history addressing the Court's proper field of inquiry in a determination of substantial justification. The 1985 House Report on the Amendments to the EAJA provides the following guidance:

> When the case is conceded on the merits, dropped by the agency, or otherwise settled on terms favorable to the private party before any of the merits are heard, the court (or adjudicative officer) will again look to the record in the case to determine whether the position of the government was substantially justified. The record in this instance will consist of the pleadings, affidavits and other supporting documents filed by the parties in both the fee [proceeding] and the case on the merits.

H.Rep. No. 99-120, Part I, 15, 1985 U.S. Code Cong. & Ad. News, pp. 141-42.

The findings of the arbitration panel, along with the evidence considered by that panel, constitute a significant portion of the rather ponderous record compiled in this case. In its attempt to determine whether the United States was substantially justified, the Court shall not ignore all the material developed in the course of this proceeding, particularly the findings of the arbitrators. The Court, accordingly, rejects the Government's jurisdictional argument and concludes that it may consider the entire record before it in determining the question of substantial justification.

As a preliminary matter, however, the Court also rejects defendant's contention that the "agency action" to be

reviewed is FEMA's denial of plaintiff's request for an extension of the effective date of the FIS. Defendant claims that this denial would have been reviewed on the basis of the administrative record only under an arbitrary-and-capricious standard. *Camp v. Pitts,* 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Without questioning defendant's statement of the law, it must be remembered that the facts of this case raise more than the propriety of FEMA's denial of a request for an extension. The lawsuit challenges the accuracy of the FIS and the FIRM. Thus, it is *that* agency action which must be reviewed in light of the whole record under the EAJA's standard of substantial justification. 28 U.S.C. §§ 2412(d)(1)(A) & (B), (d)(2)(D).

Turning now to the issue of whether FEMA's original agency action—the performance of the FIS and FIRM—was substantially justified, the Court makes reference to the findings of the arbitrators. In this regard, it is appropriate to recall that the Court held a conference with the arbitrators on March 21, 1986, in order to define the scope of their duties. In response to the Court's description of those duties, one of the arbitrators remarked: "I guess if we find some element of the study that was done originally was totally in error, and there may be a problem evaluating what that error was in the final number, that's the only thing I can see." Transcript of Conference with the Court, March 21, 1986, at p. 10. That statement by arbitrator Richard Tomasello indicates that he saw the panel's role as an attempt to identify significant errors, if any, in the performance of the FIS, and to recalculate the BFE's to reflect the correction of those errors.

It is not disputed that Brunswick contested the base flood elevations contained in the original FIS and FIRM; nor is there any question that FEMA's methodology contained errors requiring a new BFE to be adopted. While Brunswick contends that major errors were committed, the Government defends its study by pointing out that the arbitrator's final BFE's diverged only a couple of feet from those reached by the official FIS. The degree of difference between the final figures of the panel and those of the Government are more relevant to the question of whether Brunswick prevailed than to the question of substantial justification.

A careful reading of the arbitrators' report and other relevant documents in the record leaves little doubt that the FIS contained a variety of unreasonable errors. FEMA contends that these errors represent mere differences of opinion among experts. This contention is belied by the fact that the arbitrators noted in their report those instances where FEMA's approach was reasonable under professional standards. In such cases, the panel did not attempt to reassess the data or criticize FEMA's conduct. The findings of the arbitrators demonstrate the FEMA's original agency action fell below the reasonable standard of performance of experts in the field of environment planning. Such a conclusion requires the Court to find that FEMA's original agency action in performing the FIS in this case was not "reasonable in law or fact" and, therefore, not substantially justified. *Haitian Refugee Center, supra* at 1497. Citizens and units of local government subject to federal regulations have a legitimate expectation that those federal actions will meet the professional stan-

dards of the field in which they regulate. FEMA's failure to meet those standards resulted in this litigation.

In accordance with the preceding rationale, the Court finds that the position of the United States, as expressed in the "action or failure to act by the agency upon which the civil action is based," was not substantially justified. 28 U.S.C. §§ 2412(d)(2)(D), (d)(1)(A).

(2) Legal Position of the United States

Having found that FEMA's original agency action was not substantially justified, the Court need not continue to inquiry into the substantial justification of the Government's legal position. That prior finding alone may support an award of fees incurred during the entire case on the merits. *Russell v. National Mediation Board,* 775 F.2d 1284, 1291-92 (5th Cir.1985). However, given the intensity of the dispute between the parties over FEMA's defense against certain procedural claims brought by Brunswick, the Court considers that the record should be clarified by a finding as to whether the Government's litigation position was substantially justified. The Court finds that it was.

Briefly, Brunswick raised three rather creative challenges to the FIS in addition to the attack on its accuracy. The three claims were: (1) that the methodology used by FEMA in conducting the FIS should be construed as a "rule" under the Administrative Procedure Act and, therefore, subject to notice and comment rule-making procedures, 5 U.S.C. §§ 553(b)(3), (c); (2) that the FIRM should not have been implemented without first conducting a site-specific environmental impact statement as required

in certain circumstances by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 *et seq*; and (3) that FEMA made an unlawful delegation of authority to a private contractor without adequately supervising that contractor's performance of the FIS.

As is simply demonstrated by the scores of pages of legal argument dedicated to these claims in the briefs of the parties, the law presents no immediately clear answer to the questions raised by these procedural contentions. Since the suit settled, the Court has never spoken to the merits presented by these questions. Given the lack of clarity of the governing law, the Court believes that the legal position of the Government on these claims, as well as its threshold arguments discussed earlier, were substantially justified. *Haitian Refugee Center, supra* at 1497.

II. Award of Attorney Fees, Costs and Other Expenses

Although Brunswick advances grounds for an award of fees under Fed.R.Civ.P. 11 and under common law theories of bad faith, the Court need not discuss these grounds because the above findings are sufficient to justify an award under the EAJA. Moreover, the record does not support a finding that the Government's conduct amounted to bad faith. Consequently, the only remaining issue is the proper amount of such an award under the EAJA. The United States enumerates several reasons for reducing any award to Brunswick; those reasons having colorable merit shall be considered individually.

(A) Effect of the Settlement Stipulation

On January 29, 1986, the parties signed a settlement agreement which became an Order of the Court. Paragraph 11 of the stipulation of settlement provides as follows:

> All costs of any nature incurred in implementation of this agreement, including all work performed at the direction of the panel, or as a result of the panel's decision, shall be borne equally between the City of Brunswick and the Federal Emergency Management Agency. The proportionate share of the cost of the work performed will be billed directly to each party.

Pursuant to this paragraph, defendant contends that plaintiff is not entitled to recover any costs arising from the arbitration hearing. The Government further contends, even more expansively, that no fees, expenses or costs incurred after January 29, 1986, are recoverable because that date marked the end of this litigation by way of settlement.

In response, plaintiff cites paragraph 15 of the same settlement Order, which provides that "plaintiff will make application for an award of attorney fees and costs within thirty days of the conclusion of the process outlined above." Plaintiff interprets the cost-sharing provision of the stipulation as providing that expenses will be borne equally by the parties *during* the arbitration process, but that, if Brunswick prevailed, it would then be entitled to seek reimbursement of those expenses.

The plain language of the stipulation imposes an obligation on Brunswick to pay half of the costs incident to the arbitration process. While these costs clearly are not

meant to include attorney fees, they must be understood to encompass the fees of the arbitrators, the fees of witnesses and consultants requested by the arbitrators, reporting and duplication costs and other such expenses made necessary by the panel's proceedings. The agreement to share these costs is a "special circumstance" within the meaning of that term in 28 U.S.C. § 2412(d)(1)(A) which would make an award of these costs unjust. Accordingly, none of the costs charged to plaintiffs as a result of the arbitration process may be recovered under the EAJA.

With regard to the Government's argument that the EAJA does not permit the recovery of any fees or costs incurred subsequent to the January 29, 1986, settlement stipulation, the Court turns to cases addressing a similar situation arising under the Civil Rights Attorney Fee Awards Act, 42 U.S.C. § 1988. Fees incurred as a result of work performed after the date of a settlement agreement are recoverable under § 1988 provided the work was "closely related to the primary issue and objective of the case." *Williams v. City of Fairburn, Ga.*, 702 F.2d 973, 976 (11th Cir. 1983). In this case, plaintiff's counsel was duty-bound to pursue Brunswick's case throughout the arbitration process. Accordingly, the Court finds that fees and expenses arising out of the settlement activities preceding the Court's Order of October 30, 1986, are generally recoverable under the EAJA.

(B) Permissible "Other Expenses"

Defendant urges the reduction of any award to plaintiff through a restrictive interpretation of the term "other expenses" found in § 2412(d)(1)(A). The contention of

the Government rests on a construction of the EAJA in light of other "costs" statutes.

First, FEMA contends that any expert witness fees sought by plaintiff should be limited to the statutory amount specified in 28 U.S.C. § 1821. Witness fees taxed under that statute have been strictly limited to the statutory amounts. *Kivi v. Nationwide Mutual Ins. Co.*, 695 F.2d 1285, 1289 (11th Cir.1983). FEMA further argues that the only experts entitled to such specifically defined fees are those who *testified* as witnesses.

Second, FEMA argues that the only recoverable costs are those listed in 28 U.S.C. § 1920. That statute permits the Court to tax such costs as the fees of the clerk, court reporting and transcript fees, fees for printing and witnesses, fees for copying, docket dees and fees of court-appointed experts, provided that these expenses are necessarily incurred for use in the case. 28 U.S.C. § 1920(1)-(6). The EAJA allows a plaintiff to recover "costs, as enumerated in Section 1920 of this title. . . ." 28 U.S.C. § 2412 (a). In this case, the Court finds that the costs plaintiff seeks for depositions, copying and court hearing transcripts were necessarily incurred for use in the case.

Third, FEMA limits the meaning of "other expenses" under the EAJA exclusively to those examples listed in § 2412(d)(2)(A). In that section, Congress defined "fees and other expenses" to "include":

> the reasonable expenses of expert witnesses, the reasonable costs of any study, analysis engineering report, test or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. . . .

On the authority of this language, defendant urges the Court to deny any other expenses sought by plaintiff, such as taxi fares, messenger services, travel expenses, telephone bills and postage.

Brunswick responds first that "expert fees" are recoverable under § 2412(d)(2)(A) without reference to the statutory amounts provided in 28 U.S.C. § 1821; second, that "other expenses" under the EAJA permits the award of costs in addition to those specified in 28 U.S.C. § 1920; and, finally, that the definition of "other expenses" set out in § 2412(d)(2)(A) was not meant to be exclusive.

The structure of the EAJA indicates that recoverable "fees and expenses" are "*in addition* to any costs awarded pursuant to" § 1920. 28 U.S.C. § 2412(d)(1)(A). At the same time, those fees and expenses may be awarded only subject to the exceptions "otherwise provided by statute. . . ." *Id.* Since the EAJA refers to prevailing market rates as a method for determining proper amounts of fees, the Court is dubious of the contention that the amounts awardable were meant to be governed by § 1821. 28 U.S.C. § 2412(d)(2)(A). To the extent that such fees include the reasonable expenses of expert witnesses, it is evident that Congress did not intend the restrictive amounts of § 1821 to apply. As for the claim that only expert fees of *witnesses* are permitted under the EAJA, the Court finds that the answer turns on whether the list of examples provided in § 2412(d)(2)(A) is exclusive or simply illustrative.

Turning again to the structure of the definitions contained in the EAJA, it appears that where the drafters

used the word "includes" they intended to provide a *non-exhaustive* list of examples to clarify the meaning of the term. For example, § 2412(d)(2)(G) provides that "'court' *includes* the United States Claims Court," (yet that section may not be interpreted to mean that *this Court* would not meet the statutory definition); likewise, in § 2412(d)(2)(C), "'United States' *includes* any agency and any official of the United States acting in his or her official capacity." Where Congress intended a more exclusive definition, it used the word "means," as in § 2412 (d)(2)(B), where "party" *means* an individual with the appropriate net worth. Several circuits have construed "fees and other expenses" to encompass "costs that are ordinarily billed to a client." *International Woodworkers of America v. Donovan*, 769 F.2d 1388, 1392 (9th Cir.1985); *Aston v. Secretary of Health and Human Services*, 808 F.2d 9, 12 (2d Cir.1986). The Court agrees with the conclusion of these cases that the list of expenses provided in § 2412(d)(2)(A) was not meant to be all-inclusive. Such a reading resonates with the purposes of the EAJA in allowing prevailing parties in actions against the Government to be *fully* compensated for the costs of asserting their rights in cases where the Government's position is not substantially justified.

(C) Permissible Attorney Fees

Defendant launches a three-pronged attack on the amount of fees charged by plaintiff's counsel: (1) that Mr. Walbert's rate of $125 per hour is in excess of the $75 per hour recommended by the statute, and that any other rate should be measured by the prevailing market rate in this District; (2) that counsel has billed an excessive num-

ber of hours for the amount of work represented by this case; and (3) that counsel's rate of pay should be discounted according to the nature of the work performed.

Regarding the proper rate for Walbert, the Court refers to § 2412(d)(2)(A) of the EAJA, which provides:

> (ii) attorney fees shall not be awarded in excess of $75.00 per hour unless the Court determines that an increase in the cost of living or a special factor such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

Under its authority pursuant to the above-quoted statute, the Court hereby determines, on the basis of its own close familiarity with the qualifications of the local bar, that a $125 hourly rate for an attorney of Walbert's special training and experience is justified by the limited availability of equally qualified attorneys capable of adequately handling this kind of case. To this highly complicated, scientifically oriented case Walbert brought the skills of graduate training in physics and significant experience in complex federal litigation. For this same reason, the Court finds that the Atlanta area is the appropriate region for determining the prevailing market rate, because that is the nearest market for attorneys with the requisite qualifications in this type of litigation.

Defendant also argues that attorney Highsmith's rate of $75 per hour, being higher than what he normally charges the City for his services, is unjustified. A determination of whether such a rate is reasonable may be made with reference to certain factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974). Taking into account those of the *Johnson*

factors which are relevant, the Court finds that the $75 hourly fee for Highsmith is justified. Specifically, considering the novelty and difficulty of the questions in this case, the high degree of technical skill necessary to perform the service properly, the customary fee in Brunswick (which, for highly qualified attorneys, is $75 per hour), the amount of time and money involved in the case and the favorable results obtained, along with the experience, reputation and abilities of the attorneys, there is sufficient ground to support an award of fees at $75 per hour for Highsmith and $125 per hour for Walbert. *See also N.A.A.C.P. v. City of Evergreen, Ala.*, 812 F.2d 1332, 1336 (11th Cir.1987); *Florida Sun Coast Villas, Inc. v. United States*, 776 F.2d 974 (11th Cir.1985).

Focusing next on the question of whether plaintiff's counsel seeks an excessive number of billable hours, the Court is likewise unpersuaded by the showing of defendant. Simply because attorneys in other situations have billed less time for longer cases does not show that plaintiff's counsel in *this* case has padded his bill. The Court is acutely cognizant of the fact that the highly technical nature of this case has required an enormous investment of time. Because defendant has been unable to specify instances of exaggerated hourly estimates, and the Court independently can detect no examples of excess, the number of hours billed by Walbert must stand as accurate.

Defendant's third argument is that plaintiff's attorney fees should be recalculated at different rates according to the nature of the task performed. Defendant fails to show which of the tasks performed by Walbert could be considered non-legal work, and plaintiff alleges that no

clerical or paralegal work was included in his firm's billings. Defendant does point to a variety of tasks performed by Highsmith which allegedly do not constitute "substantive legal work" and, therefore, should command a lesser rate. *Johnson, supra* at 717. The Court concurs with the *Johnson* rule on this question, and Highsmith's award will be reduced according to the rationale discussed below.

(D) Availability of Fees for Fee Litigation

This Circuit has not conclusively decided the question of whether those fees incurred in the course of litigation over fees should be awarded under the EAJA. Although a panel of the Eleventh Circuit had adopted a *per se* rule allowing the recovery of "fees on fees" in *Haitian Refugee Center v. Meese,* 791 F.2d 1489, 1500 (11th Cir.1986), that portion of the opinion establishing the *per se* rule was later vacated on petition for rehearing. *Haitian Refugee Center v. Meese,* 804 F.2d 1573 (11th Cir.1986). Those circuits which have treated this question have almost uniformly adopted the rule that a party is not entitled to an award of fees *on fees* unless the Government's position in litigating the fee issues was not substantially justified. *American Academy of Pediatrics v. Bowen,* 795 F.2d 211 (D.C.Cir.1986); *Russell v. National Mediation Board,* 775 F.2d 1284, 1291 n. 8 (5th Cir.1985); *Cornella v. Schweiker,* 741 F.2d 170 (8th Cir.1984); *Rawlings v. Heckler,* 725 F.2d 1192 (9th Cir.1984).

Relying then on the persuasive authority of these decisions, the Court holds that plaintiff is not entitled to an award of fees incurred as a result of this fee litigation

because the Court cannot conclude that the Government's legal positions in opposition to the fee petition were not substantially justified. Given that the purpose of the EAJA is to permit an award of fees only where the Government's position is not substantially justified, an award of fees on fees would not be appropriate in this case.

(E) Miscellaneous Grounds for Reduction of the Award

The preceding discussion has focused on those contentions considered by the Court to be the most significant and dispositive of the parties' claims. Contentions not specifically treated were weighed and considered unworthy of discussion. Consequently, while the result of this case may be supported adequately by the preceding rationale, the Court believes it would be appropriate to address several other miscellaneous grounds put forward by defendant to justify a reduction in the award.

(1) Plaintiff's "Limited Success"

As discussed previously and at length, the Court is of the opinion that plaintiff prevailed on its central claim, which was that the original FIS was unreasonably inaccurate. However, in *Hensley v. Eckerhart,* 461 U.S. 424, 439, 103 S.Ct. 1933, 1942, 76 L.Ed.2d 40 (1983), the Supreme Court held that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained."

Although plaintiff did not succeed on the merits of any of the counts enumerated in its complaint (because

plaintiff lost one claim at summary judgment and the other claims were settled), the Court is unable to conclude that the time spent on any *single* claim was unproductive toward or unrelated to the ultimate favorable disposition of the suit. Although plaintiff's procedural claims would have required a different factual inquiry from that necessary for a hearing on the adequacy of the FIS, those claims arose out of the same set of facts giving rise to the dispute, and leading eventually toward its settlement. The Court is not capable of discerning which of these undecided claims were in fact "successful" in determining the final results in plaintiff's favor. Indeed, viewing the litigation and settlement process as a whole, the Court is convinced that plaintiff's claims were an inter-related attempt to force the revision of the FIRM. Since that goal *was* achieved, no reduction in the award on the grounds that some of the claims were "unsuccessful" is in order.

(2) Plaintiff Unreasonably Protracted Litigation

The record is replete with examples of aggressive tactics and strategies seemingly interposed for the purposes of delay on the part of *both* of these parties. Each party could be accused of seeking to delay these proceedings when such a delay was perceived to be in its interest. Under these circumstances, the Court is unwilling to tax *only* plaintiff for following this course of possibly overzealous advocacy.

(3) Adequacy of Highsmith's Records

The original time records submitted by Highsmith failed to allocate with precision the amount of time spent

on each of the tasks enumerated. In a supplemental filing, Highsmith provides a more detailed daily summary of his time. Although defendant contends that "casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorney fees." *National Association of Concerned Veterans v. Secretary of Defense,* 675 F.2d 1319, 1327 (D.C. Cir.1982), the Court considers Highsmith's supplement a credible and accurate reconstruction of the amount of time consumed by his services. Moreover, while plaintiff bears the burden of "establishing entitlement to an award and documenting appropriate hours and appropriate hourly rates," *Hensley v. Eckerhart, supra* at 437, 103 S.Ct. at 1941, there is no requirement in this Circuit that "contemporaneous time records" constitute the only acceptable method of documentation.

Nevertheless, as noted in the Court's discussion on permissible attorney fees, defendant correctly observes that Highsmith's records contain charges for "non-legal" services at a single uniform rate. The Court has carefully examined Highsmith's records and finds references to a variety of non-legal work which could have been performed by non-professional staff and, therefore, should not be assessed at attorney fee rates. The format of Highsmith's records does not precisely state the number of hours attributed to each individual task. The Court, therefore, must necessarily make a reasonable estimate of the hours spent on the non-legal work described in Highsmith's records. Those records are sufficiently descriptive to determine which entries would be considered "non-legal," and the Court refers to those entries characterized as trips to City Hall, trips to various printing shops, arranging of

travel plans and preparing Federal Express shipments as examples of "non-legal" work. Approximately 26 of Highsmith's hours shall accordingly be recalculated at a lower rate of $25 per hour, resulting in a reduction of his award by $1,300. In addition, it is apparent that Highsmith seeks compensation for 25.5 hours of work spent on preparation of Brunswick's fee application. Since "fees on fees" are not recoverable, another $1,912.50 must be deducted from Highsmith's award.

CONCLUSION

Having found that plaintiff prevailed in this litigation, and that the original agency action of defendant was not substantially justified, the Court hereby AWARDS to plaintiff the following attorney fees, costs and other expenses, pursuant to 28 U.S.C. §§ 2412 and 1920:

I.	Attorney Fees, Costs and Other Expenses Under the EAJA		
	A. Attorney Fees:		
	Walbert & Hermann	$ 95,751.25	
	Eugene Highsmith	116,600.00	
	B. Assistance of Experts	80,032.87	
	C. Travel:		
	For depositions	6,790.01	
	Other necessary for the case.	5,252.46	
	D. Federal Express and Courier	2,130.95	
	E. Long Distance Calls	2,535.00	
	F. Exhibits	3,783.76	
	SUBTOTAL		$312,876.10
II.	Costs Under § 1920		
	A. Depositions	$ 7,740.30	
	B. Copies	3,875.75	
	C. Transcripts	117.75	
	SUBTOTAL		$ 11,616.05
	GRAND TOTAL		$324,492.15

Accordingly, the Court finds that plaintiff's petition for an award of attorney fees, costs and other expenses is hereby GRANTED in the amount of $324,492.15 and the Clerk is directed to enter an appropriate judgment in that amount.

FOR THE ELEVENTH CIRCUIT

No. 87-8543

D.C. Docket No. 285-142

THE CITY OF BRUNSWICK, GEORGIA,

Plaintiff-Appellee,
Cross-Appellant,

versus

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants,
Cross-appellees.

Appeals from the United States District Court for the Southern District of Georgia

---

(Filed Sept. 20, 1988)

Before JOHNSON and HATCHETT, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment

*Honorable Jesse E. Eschbach, Senior U. S. Circuit Judge for the Seventh Circuit, sitting by designation.

of the said District Court in this cause be and the same is hereby, REVERSED;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 11, 1988

For the Court: Miguel J. Cortez, Clerk

By: Warren A. Godfrey
Deputy Clerk

By: Dwight W. Briggs
Deputy Clerk, Atlanta, Georgia
Issued as Mandate: Sep. 19, 1988.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8543

THE CITY OF BRUNSWICK, GEORGIA,

Plaintiff-Appellee,
Cross-Appellant,

versus

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

---

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Filed September 7, 1988)

(Opinion July 11, 11 Cir., 1988, — F.2d —).

Before JOHNSON and HATCHETT, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(√) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate

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* Hon. Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

§ 2412. Costs and fees

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

* * *

(2) For the purposes of this subsection—

* * *

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

Supreme Court, U.S.
FILED
FEB 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-948

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE CITY OF BRUNSWICK GEORGIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
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JOHN C. HOYLE
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Department of Justice
Washington, D.C. 20530
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16 pp.

QUESTIONS PRESENTED

1. Whether the net worth of a unit of local government is calculated by subtracting total liabilities from total assets in determining eligibility for awards under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(2)(B) (Supp. IV 1986).

2. Whether the government's position was substantially justified within the meaning of the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) (Supp. IV 1986).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer*, 470 U.S. 564 (1985)	8
Pierce v. *Underwood*, No. 86-1512 (June 27, 1988)	6, 10, 11, 12
Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983)	10
Russell v. *National Mediation Board*, 775 F.2d 1284 (5th Cir. 1985)	12
United States v. *Estridge*, 797 F.2d 1454 (8th Cir. 1986)	13

Statutes and regulation:

Equal Access to Justice Act:	
28 U.S.C. 2412(d)(1)(A) (Supp. IV 1986)	5
28 U.S.C. 2412(d)(2)(B) (Supp. IV 1986)	5
42 U.S.C. 4001 *et seq.*	2
42 U.S.C. 4104(g)	3, 4
44 C.F.R. 59.1	2

Miscellaneous:

H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980)	9
S. Rep. No. 253, 96th Cong., 1st Sess. (1979)	9

In the Supreme Court of the United States

OCTOBER TERM, 1988

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THE CITY OF BRUNSWICK GEORGIA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 849 F.2d 501. The opinion of the district court (Pet. App. 15-52) is reported at 661 F. Supp. 1431.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1988 (Pet. App. 53-54). Rehearing was denied on September 7, 1988 (Pet. App. 55-56). The petition for a writ of certiorari was filed on December 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has established a program of federally subsidized flood insurance, known as the National Flood

Insurance Program, for communities that carefully control the development of land historically likely to be subject to floods. 42 U.S.C. 4001 *et seq.*; Pet. App. 16. Petitioner applied to be included in that program, and the Federal Emergency Management Agency (FEMA) employed a private engineering firm—Camp, Dresser & McKee (CDM)—to perform a flood insurance study (FIS)[1] for Brunswick and the surrounding tri-county area (Pet. App. 16-17). CDM was also directed to create a flood insurance rate map (FIRM)[2] (*id.* at 17-18). In July 1982, petitioner was given copies of the FIS and the draft FIRM for its information and review (*id.* at 7). These documents notified petitioner of the proposed base flood elevations (BFE)[3] and were published in *The Brunswick News* on August 25, 1983, and September 1, 1983 (*ibid.*).

Petitioner, in a joint appeal with Glynn County, Georgia, objected to certain aspects of the draft FIRM, and on November 1, 1984, FEMA informed petitioner that some modifications had been made in light of those objections (Pet. App. 7-8). FEMA enclosed a revised FIRM and stated that petitioner had thirty days to review

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[1] "The purpose of the FIS is to identify 'flood plains,' such as 'coastal areas in the United States which have special flood hazards,' and to establish 'flood risk zones' and make 'estimates with regard to probable flood-caused loss' for such zones" (Pet. App. 17).

[2] A flood insurance rate map is created from the results of the flood insurance study. It is an official map of the community, delineating the "special hazard areas and the risk premium zones applicable to the community" (44 C.F.R. 59.1).

[3] "The BFE is the estimated water level of a 'flood having a one percent chance of being equaled or exceeded in any given year'. [Accordingly, it] affects both the insurance rates to be charged and the permissible types of construction in flood-risk zones" (Pet. App. 7).

and comment on the attached maps (*ibid.*). Petitioner did not submit additional scientific or technical data (*ibid.*).

On December 19, 1984, FEMA notified petitioner that the final FIRM would go into effect on June 19, 1985, and that petitioner had six months to adopt ordinances meeting minimum safety standards required for eligibility for subsidized insurance (Pet. App. 8). By statute, petitioner had 60 days from the date of this notice to seek judicial review of FEMA's final determination (*id.* at 9; 42 U.S.C. 4104(g)). Petitioner did not seek such review within that time. Indeed, it did not even respond to FEMA until May 1, 1985. Pet. App. 9. In its response, petitioner sought a nine-month extension of the FIRM's effective date, claimed that the FIS was technically deficient, and asserted that FEMA should have conducted an environmental impact statement (EIS) for the Brunswick area (*ibid.*). FEMA refused to grant the extension, stated that an EIS was not required, invited petitioner to submit additional flood data (which petitioner did), and declined to alter the FIS or FIRM (*ibid.*).

2. On July 16, 1985, petitioner filed suit in district court against FEMA seeking to enjoin FEMA from implementing the FIRM and requesting declaratory relief on the basis of the following contentions (Pet. App. 11):

> (1) that the proposed BFE's were inaccurate,
> (2) that FEMA was obligated to perform a site-specific EIS before implementing a FIRM,
> (3) that FEMA violated its own regulations by failing to conduct notice-and-comment rule making on the methodology to be used in performing the FIS, and
> (4) that FEMA unlawfully delegated critical fact-finding functions to a private entity (i.e., the private engineering firm) without exercising meaningful supervision over its work.

On January 9, 1986, the district court granted FEMA's motion for summary judgment on the claim seeking review of the proposed BFEs because FEMA had failed to comply with the sixty-day time limit of 42 U.S.C. 4104(g) (Pet. App. 19). The court, however, denied FEMA's motion for summary judgment with regard to the remainder of petitioner's complaint (*i.e.*, the allegations of procedural deficiencies), and directed that those claims be set for trial (*ibid.*).

Prior to trial, the parties reached a settlement agreement, which was approved by the district court on January 29, 1986 (Pet. App. 19). The settlement agreement, under which petitioner agreed to dismiss its action against FEMA with prejudice, provided that the parties would attempt to resolve the issues raised by petitioner regarding the performance of the flood insurance study and that any issue not resolved would be referred to a panel of expert arbitrators (*ibid.*). FEMA agreed to modify the FIRM if the arbitrators selected new BFEs; the modifications were to become effective by order of the district court (*id.* at 19-20). After the parties failed to resolve all of the issues, the arbitration panel considered petitioner's claims, and accepted some aspects of petitioner's position and rejected others. The arbitrators' report resulted in the reduction of the original BFEs, by, on average, only 1.7 feet (R6-159 Exh. B at 2). FEMA issued a new FIRM, which was made effective by the district court's order of October 30, 1986 (Pet. App. 21).

3. After entry of the October 30th order, petitioner sought $477,984.11 in costs, expenses, and attorneys' fees under a variety of statutes and equitable theories (Pet. App. 15). FEMA opposed the request. On May 20, 1987, the district court held that petitioner was entitled to attorneys' fees and expenses under the Equal Access to

Justice Act (EAJA) and awarded petitioner $312,876.10 for attorneys' fees and expenses and $11,616.05 for costs (Pet. App. 51). In making this award, the district court ruled on a number of issues concerning petitioner's eligibility for an award under EAJA. The only issues relevant at this stage are: (1) whether petitioner's net worth was in excess of the statutory limit for eligibility for awards under EAJA; and (2) whether the position of the United States was "substantially justified" so as to preclude an award under EAJA.

To be eligible for fees under EAJA, a unit of local government may not have a net worth in excess of $7 million at the time the action was filed. 28 U.S.C. 2412(d)(2)(B) (Supp. IV 1986). The United States, citing petitioner's Annual Financial Report showing a Total Municipal Equity in excess of $20 million, argued that petitioner's net worth exceeded the statutory limit. The district court rejected this argument, holding that calculation of petitioner's net worth should not include the net value of "restricted assets," *i.e.*, those assets reserved for a specific use by petitioner, such as for water utilities, parks, or government buildings (Pet. App. 31-33). The court stated that Congress intended the courts to focus "on actual *ability to pay*," and that only wholly unrestricted assets were available for the payment of attorneys' fees and expenses (*id.* at 32-33, emphasis in original). Applying that standard, the court ruled that petitioner's net worth did not exceed the statutory $7 million limit (*id.* at 33).

EAJA also precludes an award if the position of the government was "substantially justified." 28 U.S.C. 2412(d)(1)(A) (Supp. IV 1986). The district court required that the government's position be justified by "more than mere reasonableness" (Pet. App. 34). It focused its inquiry almost wholly on whether FEMA was substantially justi-

fied in promulgating the flood insurance study (*id.* at 34-39). The district court concluded (*id.* at 37) that the arbitrators had found "unreasonable errors" in the FIS and held that the government's position, for that reason, was not substantially justified (*id.* at 38).

4. The court of appeals reversed the district court's award on alternative and independent grounds. First, the court held that the district court had erred in interpreting the statutory net worth limitation. It concluded (Pet. App. 4) that the district court erroneously excluded restricted assets from the net worth calculation on the ground that it should independently focus on petitioner's ability to pay attorneys' fees. The court of appeals ruled (*ibid.*) that the $7 million limit set in the statute represented "Congress' concern with the 'ability to pay' factor," and that the district court erred in engrafting its own concerns about ability to pay onto the congressionally set limit. The court of appeals determined that the statutory net worth limit was to be calculated by subtracting total liabilities from total assets, as the legislative history indicated (*id.* at 3, 4), and that when restricted, as well as unrestricted, assets were included in the calculation, petitioner's net worth exceeded the $7 million limit (*id.* at 5). Accordingly, the court of appeals concluded (*ibid.*) that the statutory net worth limitation made petitioner ineligible for an award under the EAJA.

Second, ruling just a few days after this Court's decision in *Pierce* v. *Underwood,* No. 86-1512 (June 27, 1988), the court of appeals—like the district court—applied the now rejected "more than mere reasonableness" test to the issue of whether the government's position was substantially justified (compare Pet. App. 6 with *Underwood*, slip op. 10-14). Nevertheless, the court of appeals determined (Pet. App. 6) that the district court abused its discretion in rul-

ing that the position of the United States was not substantially justified. The court of appeals, unlike the district court, did not focus wholly on the accuracy of the flood insurance study in determining whether FEMA had been substantially justified. Rather, the court of appeals looked at the totality of the government's actions and positions in this case.

The court determined that the government's position at the agency level was substantially justified (Pet. App. 9). FEMA had followed the procedures outlined by the applicable statute, advised petitioner of the proposed BFEs, and informed petitioner that it had thirty days to respond to the ruling on the joint appeal of petitioner and Glynn County before the BFEs became final (*id.* at 9-10). When petitioner failed to respond within the thirty-day period and then failed again to seek judicial review within the statutory time period, FEMA was substantially justified in refusing to grant an extension of the FIRM's effective date and in refusing to modify the FIS (*id.* at 10).

The court of appeals also determined that the government's pre-stipulation litigation position was substantially justified (Pet. App. 11-12). The district court had granted, on timeliness grounds, the government's motion for summary judgment with regard to petitioner's claim that the FIS was inaccurate and had determined that the government's defense of the three claims regarding alleged procedural deficiencies was substantially justified. Petitioner did not challenge these rulings on appeal.

Finally, the court of appeals determined (Pet. App. 12-14) that the government's post-stipulation litigation position was also substantially justified. The court ruled that the district court abused its discretion by examining only the accuracy of the FIS, when it should have looked

at the position the government took before the arbitration panel (*id.* at 12, 14). The court of appeals reviewed the record and found (*id.* at 13-14) that the arbitrators had agreed with the government on several issues, while disagreeing in some respects on others. The court concluded that although the arbitration panel did not agree entirely with the government on all of the issues before it, the government's position before the arbitrators was substantially justified (*id.* at 14).

ARGUMENT

The ruling of the court of appeals that petitioner is ineligible for an award under EAJA is based on two independent grounds. Each ground is correct and neither conflicts with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals determined that in calculating the net worth of a unit of local government under EAJA, total liabilities are subtracted from total assets, whether those assets are restricted or unrestricted. That conclusion, concerning a matter of first impression, was clearly correct.

The difference between the district court and the court of appeals over the application of EAJA's net worth limitation concerned a question of law:[4] whether Congress

[4] Petitioner's complaint (Pet. 8) that the court of appeals' ruling on this issue is inconsistent with *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985) (district court's findings of fact are not to be reversed unless they are clearly erroneous), is based on a misapprehension of the nature of the district court's determination. As the court of appeals' opinion makes clear, the difference between the district court's conclusion on this issue and that of the court of appeals is not over factual findings, but is purely a difference in statutory interpretation. Accordingly, petitioner's discussion (Pet. 9-11) of the differences between the testimony of experts who testified for the parties is irrelevant.

intended restricted assets (*i.e.*, assets reserved for a specific use such as water utilities, parks, or government buildings) to be included in a local government's net worth in determining whether it exceeded the net worth limitation. The district court's determination (Pet. App. 32-33) that restricted assets should not be included in the calculation was based on its conclusion that Congress intended the courts to engage in an independent assessment of the locality's ability to pay for litigation against the federal government. The district court reasoned that since many of petitioner's assets were restricted, they would not be available to pay attorneys' fees, and thus should not be included in the calculation of net worth.

The court of appeals, in contrast, concluded that Congress had itself made the ability to pay determination when it established the $7 million limitation. Although EAJA does not define the term "net worth," the court of appeals noted (Pet. App. 3, 4) that the accompanying committee reports state that net worth is "calculated by subtracting total liabilities from total assets." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980); S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979).[5] Thus, the court of appeals concluded that Congress intended courts to determine eligibility for an EAJA award simply by subtracting total liabilities from total assets, and not to engage in an independent analysis of the availability of different types of local government assets for underwriting litigation.

The court of appeals' ruling is correct. There is nothing in the statutory language or the legislative history that indicates that net worth is to be calculated other than by sub-

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[5] This statement was made before EAJA was amended to apply to units of local government in 1985, but there is no reason to believe that it is inapplicable to them.

tracting total liabilities from total assets. In focusing on petitioner's "ability to pay," the district court imposed an additional requirement not set by Congress—a requirement that would force courts to engage in a time-consuming and unguided analysis of the relative "liquidity" of different types of local government assets. Petitioner's unsupported assertion (Pet. 9) that the court of appeals' ruling "as a practical matter[] renders the overwhelming majority of local governments ineligible to recover costs and fees under EAJA," even if true, is irrelevant. It is for Congress, not the courts, to set the net worth limitation for EAJA awards. If Congress desires to raise the net worth limitation above $7 million or to exclude restricted assets from the calculation of a city's net worth, it can do so. To date, however, Congress has not taken such action.[6]

2. Petitioner argues (Pet. 12) that the court of appeals erred by failing to consider adequately the "underlying agency action" in determining that the position of the United States was substantially justified. In fact, however, the court of appeals considered the agency action more comprehensively and in more detail than did either the district court or petitioner.[7]

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[6] Since EAJA is a waiver of sovereign immunity, care must be taken not to enlarge that waiver beyond a fair reading of the relevant sections of the statute. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983).

[7] Both the district court and the court of appeals evaluated the substantial justification of the government's position under the now rejected "more than mere reasonableness" test. *Pierce* v. *Underwood*, *supra*, slip op. 10-14. Given the court of appeals' conclusion that the government's position was substantially justified under the "more than mere reasonableness" test, it follows *a fortiori* that the government was substantially justified under the proper "reasonableness" test.

The court of appeals considered—and found substantially justified—the government's action at each stage of the proceedings of this case, *i.e.*, FEMA's actions prior to the litigation, the government's pre-stipulation litigating position, and the government's post-stipulation litigating position.

Petitioner's view is that the government's position was not substantially justified because there were some errors in the FIS. As the court of appeals correctly determined, however, the proper inquiry is broader; a court should not examine one issue—such as the accuracy of the FIS—in isolation. Rather, a court should examine the government's overall position at each stage of the controversy between petitioner and the government and ask whether the government's position at each stage, taken as a whole, was substantially justified. In any event, the accuracy of the FIS would not even have been before the court except for the stipulation entered into by the government, because petitioner failed to comply with the statutory time limit for challenging the study. Moreover, the court of appeals also found that the government's position before the panel of arbitrators who, by the stipulation, were authorized to consider the accuracy of the FIS, was substantially justified (Pet. App. 13-14).[8] In short, the court of appeals concluded that the government's position, at each stage of the controversy, was "substantially (*i.e.*, for the most part) justified" *Pierce* v. *Underwood,* slip op. 12 n.2.

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[8] Petitioner challenged four aspects of the FIS; the arbitrators accepted a substantial portion of the government's response to those challenges. The four aspects of the FIS challenged by petitioner were (Pet. App. 13): "(1) selection and use of storm data, (2) wave height analysis, (3) use of the TTSURGE model, and (4) topography". The court of appeals correctly described the arbitrators' response to the

Petitioner asserts that the decisions on the issue of substantial justification by district courts "should be entitled to a heavy presumption of irregularity [presumably, regularity]" (Pet. 15). It is of course established that the decision of a district court on the question whether the government's position was substantially justified is entitled to deference. *Pierce* v. *Underwood,* slip op. 9. In the instant case, however, the court of appeals carefully identified the legal error that the district court made in setting the parameters for the consideration of that question: it focused too narrowly on the accuracy of the FIS. In first identifying the district court's error, and then reviewing aspects of the Government's position that the district court

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government's submissions regarding those challenges (*id.* at 13-14):

> First, the panel credited the testimony by government witnesses and determined that the government's wave height analysis was properly conducted. * * * Second, the panel adopted the conclusions of the government's witness as to pressure distribution and nineteenth century storm data. * * * Third, FEMA acknowledged that the central pressure distribution of exiting storms should differ from those of entering and alongshore storms, that proper use of storm frequencies would tend to raise flood elevations, and that errors in the FIS related to joint probability calculations should be corrected in determining new BFE's. * * * Fourth, FEMA promised to incorporate into the FIRM Riverside data supplied by [petitioner].

Thus, despite petitioner's assertion to the contrary, the court of appeals did consider FEMA's underlying action in ruling that the government's position was substantially justified. Petitioner is accordingly incorrect in asserting that there is a conflict between the court of appeals' decision and *Russell* v. *National Mediation Board,* 775 F.2d 1284, 1291 (5th Cir. 1985) ("position of the United States" for EAJA purposes includes both its litigation position and the underlying agency action).

erroneously ignored, the court of appeals exercised its proper role in reviewing the district court's determination.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
MICHAEL JAY SINGER
JOHN C. HOYLE
Attorneys

FEBRUARY 1989

[9] Petitioner incorrectly asserts (Pet. 15) that the court of appeals' decision conflicts with *United States* v. *Estridge*, 797 F.2d 1454 (8th Cir. 1986). In that case, the court of appeals determined that the government did not identify any errors in the district court's factual findings or its application of the law. Consequently, the court of appeals declined to second-guess the district court's conclusion that the government's position was not substantially justified. Here, by contrast, the court of appeals clearly identified the error of the district court in applying the law by focusing too narrowly on only one aspect of the underlying agency action.

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